



Supreme Court of the United States

WOMACK+HAMPTON ARCHITECTS, L.L.C.,

Petitioner,

v.

METRIC HOLDINGS LIMITED
PARTNERSHIP, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. When interpreting an unambiguous license of subject matter protectable under Title 17, United States Code, is the district court bound by the express terms of the license as has been previously held by this Court, as well as the Second Circuit, Ninth Circuit and Court of Federal Claims, or is the court free to read into the license the conveyance of other rights based on the court's belief regarding what the parties may have "anticipated" would be conveyed?
2. Did the lower court err in its construction of the Owner/Architect Agreements since the result of the decision was to frustrate the purposes of the Copyright Act by usurping those rights specifically identified under 17 U.S.C. § 106?

PARTIES TO THE PROCEEDING

- PETITIONER:** Womack+Hampton Architects,
L.L.C.
- RESPONDENTS:** Metric Holdings Ltd., Partnership
Chiles Architects, Inc.
Trammel Crow Residential
Company
TCR Operating Company, Inc.
TCR Metric, L.P.
South Central RS, Inc.
TCR South Central, Inc.
TCR South Central 1995, Inc.
TCR South Central Division L.P.
TCR Metric Construction Ltd.,
Partnership
Gary Chiles
Lewis Bunch
Robert Buzbee
J. Ronald Terwilliger
Kenneth J. Valach
Chris Wheeler
Perry Wilson
TCR Los Rios Limited Partnership
SDT Architects, Inc.
Jerry Daniels
Tim Hogan
Thomas Stoval
John Zeledon

CORPORATE DISCLOSURE STATEMENT

The Petitioner is Womack + Hampton Architects, L.L.C. ("WHA"). WHA is not a publicly held corporation, nor is any part of it owned by one, and there is no other interested party.

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Petitioner, Womack+Hampton Architects, L.L.C. ("WHA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 22, 2004.

OPINIONS BELOW

1. The February 19, 2003 Order of the United States District Court for the Western District of Texas is unreported and reproduced at Appendix 25a-28a.
2. The April 18, 2003 Order of the United States District Court for the Western District of Texas is unreported and reproduced at Appendix 21a-24a.
3. The June 22, 2004 per curium Opinion of the United States Court of Appeals for the Fifth Circuit is unpublished, unreported and reproduced at Appendix 1a-18a.

JURISDICTION

A three judge panel of the United States Court of Appeals for the Fifth Circuit entered its ruling affirming a summary judgment dismissing Petitioner's copyright infringement claim against Respondents on June 22, 2004. (1a-18a).

Petitioner filed a Petition for Rehearing on July 6, 2004. (39a-59a). The Fifth Circuit denied that Petition for Rehearing on July 22, 2004. (29a-31a).

The jurisdiction of this Court to review the final judgment of the Court of Appeals' dismissal of Petitioner's infringement claim is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves those rights accorded the owner of a copyright. The exclusive rights in copyrighted works are addressed in 17 U.S.C. § 106, which sets forth:

"Subject to sections 107 through 121, the owner of copyright under the title has the exclusive rights to do and to authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound records, to perform the copyrighted work publicly by means of a digital audio transmission."

Pursuant to this Court's Rule 14.1(f), the following provisions are set forth in the Appendix: 17 U.S.C. § 201(d)(2) (33a-34a); 17 U.S.C. § 501(a) (35a-37a).

STATEMENT OF THE CASE

Petitioner WHA brought an action in the United States District Court for the Western District of Texas for copyright infringement under the Architectural Works Copyright Protection Act ("AWCPA") alleging that Respondent TCR infringed and induced infringement of Petitioner's copyrights in certain architectural works by: (1) commissioning the creation of copies and derivative works of Petitioner's copyrighted works; and (2) construction of apartments that incorporated Petitioner's copyrighted works.

On May 22, 2002, Respondent TCR filed a motion for partial summary judgment that Petitioner's claims did not state an action for which copyright damages could be recovered since Respondent was allegedly licensed under several Owner/Architect

Agreements. (205a-218a). Petitioner both opposed TCR's motion and cross-moved for summary judgment that it was entitled to copyright damages on the basis that Respondents' use exceeded the scope of any license under the Owner/Architect Agreements. (184a-204a).

In its February 19, 2003 Order, the district court adopted the report and recommendation of the magistrate judge who recommended that Respondent TCR's motion be granted. (25a-28a). The district court relied upon Section IX(B) of the Owner/Architect Agreements as authority for the purported license for Respondents' re-use and modification of Petitioner's copyrighted works. (27a). Section IX(B), however, is clear that any re-use or modification of Petitioner's works could only be performed by "the Architect" since this same section provides that "the Architect" receive, in addition to the re-use fee, fees for "engineering services", "hourly charges" and "expenses":

B. The Owner agrees not to use, copy or cause to have copied, the drawings and specification prepared for this project on subsequent phases or other sites without proper compensation to the Architect, which shall be based upon a mutually agreed upon fee of \$150.00 per unit (base architectural fee),

plus engineering services, plus contingent additional hourly charges and expenses for plan modifications necessary to adapt these plans and specifications to other sites.

(243a-244a)(emphasis added).

Plainly, Respondent TCR would not pay "the Architect" for "engineering services," "hourly charges" and "expenses" if anyone but "the Architect" was allowed to re-use and modify Petitioner's plans. Under the only possible construction of Section IX(B), therefore, the sole party authorized to copy, re-use and modify Petitioner's copyrighted plans, upon payment of the re-use fee, was "the Architect." Per the plain language of these same Owner/Architect Agreements, "the Architect" was Petitioner, WHA. (219a). Hence, under the express terms of the Owner/Architect Agreements, Respondent TCR was not licensed to use any architect other than Petitioner to re-use or modify Petitioner's copyrighted works.

All parties agreed, and the appellate court found, that the terms of the Owner/Architect Agreements were not ambiguous.¹

Petitioner filed a motion for reconsideration of the Court's February 19, 2003 Order on March 4, 2003. (131a-150a). In this motion, Petitioner argued that Respondents' re-use and modification of Petitioner's architectural plans exceeded the scope of any license

¹ The Fifth Circuit found the contract language presented in the Owner/Architect Agreements to be unambiguous: "All parties agree that the Agreements are unambiguous." (8a, fn. 5)."

conveyed under the Owner/Architect Agreements. This Motion for Reconsideration was denied on April 22, 2003. (20a).

Subsequent to the district court's February 19, 2003 Order, Respondents filed a series of dispositive motions. On February 24, 2003, Respondent TCR filed a motion for summary judgment. (159a-165a). On February 27, 2003, Respondent Chiles also filed a motion and cross-motion for summary judgment. (151a-158a). On March 5, 2003, Respondent SDT also filed a motion for summary judgment. (121a-130a). Each of these motions sought final dismissal of all of Petitioner's claims based upon the district court's finding that Respondent TCR was licensed under the Owner/Architect Agreements to re-use and modify Petitioner's copyrighted plans.

A Final Judgment was entered on April 30, 2003. (19a). The district court erroneously reasoned that, while the express terms of the Owner/Architect Agreements did not allow for re-use and modification by architects other than Petitioner, Respondent TCR was nevertheless licensed under the Agreements based on what the district court concluded the parties may have "contemplated" would be the scope of the license. (23a-24a).

Petitioner filed an appeal to the Fifth Circuit challenging the district court's granting of summary judgment that Respondent TCR's use of architects other than Petitioner to re-use and modify Petitioner's copyrighted architectural works exceeded the scope of any license conveyed to TCR by Petitioner under the

Owner/Architect Agreements but the re-use did not amount to copyright infringement. (60a-109a). Petitioner appealed the issue of whether the district court erred in the entry of summary judgment that a cause of action for copyright infringement would not lie even where the express terms of the operative copyright licenses were admittedly exceeded. (73a).

In an opinion dated June 22, 2004, the Fifth Circuit affirmed the Judgment of the district court for equally unsound reasons. (1a-18a). The Fifth Circuit recognized that the express terms of the Owner/Architect Agreements between Petitioner and Respondent TCR were exceeded when TCR used architects other than Petitioner to re-use and modify plans for two apartment complexes in Austin and Dallas, Texas. The three judge panel nevertheless held that Respondents' actions did not give rise to an action for copyright infringement based on the panel's conclusion of what the parties "anticipated" might occur, even though these terms of "anticipation" were nowhere present in the operative copyright licenses and, in fact, were contradicted by the express wording of the licenses that identified Petitioner as the only "Architect." (12a-13a; 219a).

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's Decision Conflicts With Decisions Of This Court And Other Circuits

The Fifth Circuit in this case held that the scope of an unambiguous copyright license is not confined to its express terms but also includes that which the court

believes the parties may have “anticipated” might flow from the copyright holder.

The Final Judgment of the district court was premised on the existence of an unambiguous, express license that purportedly granted Respondent TCR the right to re-use and modify Petitioner’s copyrighted works using other architects. The construction of this re-use license must therefore be reviewed based on the constraints imposed under the Copyright Statute. Cohen v. Paramount Pictures Corp., 845 F.2d 851, 854 (9th Cir. 1988)(a copyright license must be construed in accordance with the purposes underlying federal copyright law). The Copyright Act provides that “anyone who violates one of the exclusive rights of the copyright owner . . . is an infringer of the copyright.” 17 U.S.C. § 501(a). The “exclusive rights” are defined and enumerated in 17 U.S.C. § 106. The copyright owner may transfer any or all of these rights. 17 U.S.C. §§ 106, 201(d)(2); Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255, 258 (5th Cir. 1988).

The Fifth Circuit’s opinion is at odds with this Court’s holding as well as decisions arising out of the Second and Ninth Circuits and the Court of Federal Claims. These courts have held that the scope of a copyright license is confined to its express terms and that any subject matter not expressly conveyed will be construed as remaining in the copyright holder.

Decisions arising in the patent context are given great deference in interpreting federal copyright law. This Court has held that where precedent in copyright cases is lacking, it is appropriate to look for guidance to

patent law “because of the historic kinship between patent law and copyright law.” Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 439 (1984); Dynacore Holdings Corp. v. U.S. Philips Corp., 363 F.3d 1263, 1275 (Fed. Cir. 2004); Harris v. Emus Records Corp., 734 F.2d 1329, 1333 (9th Cir. 1984).

The Fifth Court’s opinion is in direct and irreconcilable conflict with this Court’s decision in Henry v. A.B. Dick Co., in which the Court held that, in the patent context, any “use [not licensed] is necessarily reserved to the [licensor].” 224 U.S. 1, 24 (1912). The Fifth Circuit’s opinion held that Respondent TCR was licensed to re-use and modify Petitioner’s copyrighted works even though such use exceeded the scope of that unambiguous license that TCR enjoyed under the operative agreements. Hence, the Fifth Circuit held that a use not licensed is not reserved to the licensor, but instead may be conveyed, sub silentio, to the licensee even where such implied conveyance plainly exceeds the scope of the parties’ express and unambiguous agreement.

The Fifth Circuit’s opinion is further in conflict with decisions arising out of the Ninth Circuit in S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1088 (9th Cir. 1989); Cohen, 845 F.2d at 854 (the rights enumerated under 17 U.S.C. § 106, unless specifically conveyed, remain in the grantor); and Beckman Instruments Inc. v. Cincom Sys. Inc., 2000 U.S. App. LEXIS 18166, *5 (9th Cir. 2000), cert. denied, 531 U.S. 1150 (2001)(“we have rejected the argument that license agreements permit that which they do not prohibit”); the Second Circuit’s decision in Gilliam v. American Broadcasting Cos., 538 F.2d 14, 22-

23 (2nd Cir. 1976); and the decision of the Court of Federal Claims in Inslaw, Inc. v. U.S., 40 Fed. Cl. 843, 854-55 (Fed. Cl. 1998). These sister circuits have held that a copyright conveyance must be construed in accordance with the terms of the express conveyance, with all subject matter not expressly conveyed retained by the copyright holder. See, S.O.S., Inc., 886 F.2d at 1088 (“copyright licenses are assumed to prohibit any use not authorized”); Gilliam, 538 F.2d at 23 (the terms of a copyright conveyance are confined to its express terms and do not extend to that which might have been “anticipated”); Inslaw, Inc., 40 Fed. Cl. at 854-55 (the terms of a copyright conveyance should be construed to exclude that not specifically conveyed).

While the district court in this case recognized the absence of any language of conveyance in the Owner/Architect Agreements that would allow Respondent TCR (or those retained by TCR) to re-use and modify Petitioner’s copyrighted plans, that court held that the re-use clause of Section IX(B) necessarily contemplated modifications of the drawings and specifications by architects other than WHA to adapt the plans to other sites. (23a-24a). The Fifth Circuit adopted this erroneous conclusion in its opinion when it held that “the re-use provision anticipates copyright use, specifically use of the copyrighted plans for other projects” (10a)(emphasis added) and “TCR’s re-use appears to be consistent with that anticipated under the contract.” (13a)(emphasis added).

In reaching this opinion, the Fifth Circuit erred under prevailing precedent arising out of other circuits since the district court was not free to insert terms of

conveyance into the contract where none were agreed to by the parties nor evidenced in the operative documents, regardless of what was believed to have been “contemplated” or “anticipated.” See e.g., Gilliam, 538 F.2d at 23.

The Second Circuit’s decision in Gilliam addressed the requirement that a copyright license must be construed according to its literal and express terms. In Gilliam, ABC acquired the right to air excerpts from several Monty Python programs. By their express terms, the instruments conveying the license for ABC to use these programs did not allow ABC to edit these programs. Nevertheless, ABC proposed to broadcast an edited version of these excerpts as a derivative work. Monty Python sued to enjoin the proposed airing of this derivative work as beyond the scope of the license. The Second Circuit found that ABC’s creation of a derivative work exceeded the scope of the license and thus constituted an infringement of the copyrights in the original work. Gilliam, 538 F.2d at 21-23.

Identical to the reasoning applied here by the Fifth Circuit in affirming the decision of the district court, ABC contended that while the underlying copyright license did not expressly allow modification of the copyrighted work, the court should read the license to take into account what the parties “anticipated” at the execution of the Agreement. (See 13a). The Second Circuit found these arguments unpersuasive and held that the scope of the copyright license enjoyed by ABC was confined to its express terms:

Finally, ABC contends that appellants must have expected that deletions would be made in the recordings to conform them for use on commercial television in the United States. ABC argues that licensing in the United States implicitly grants a license to insert commercials in a program and to remove offensive or obscene material prior to the broadcast. According to the network, appellants should have anticipated that most of the excised material contained scatological references inappropriate for American television and that these scenes would be replaced with commercials, which presumably are more palatable to the American public.

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Several of the deletions made for ABC, such as elimination of the words "hell" and "damn," seem inexplicable given today's standard television fare. If, however, ABC honestly determined that the programs were obscene in substantial part, it could have decided not to broadcast the specials at all, or it could have attempted to reconcile its differences with appellants. The network could not, however, free from a claim of infringement, broadcast in a substantially altered form a program incorporating the script over which the group had retained control.

Gilliam, 538 F.2d at 23 (emphasis added); see also, Inslaw, Inc., 40 Fed. Cl. at 854-55 (a transfer of rights

under a copyright will not be implied absent express language of conveyance).

By its express terms, the Owner/Architect Agreements allowed Respondent TCR to exercise an option to retain "the Architect" to copy, re-use and modify Petitioner's copyrighted plans. These same Agreements defined "the Architect" as Petitioner WHA—not Respondents Chiles or SDT. The Fifth Circuit's opinion, under the guise of divining what the parties may have "anticipated," necessarily implied certain terms in the Owner/Architect Agreements not expressly set forth and agreed to between the parties. The Fifth Circuit's opinion thus runs counter to the Second Circuit's opinion in Gilliam and relies on the identical rationale presented by ABC—i.e. what the parties may have "anticipated."

The Fifth Circuit's opinion flies in the face of well-established case law regarding the construction to be applied to an unambiguous contract. The Fifth Circuit has stated "that when the contract is not ambiguous, [the court] has no authority to reach beyond the four corners of the document." Texas E. Transmission Corp. v. Amerada Hess Corp., 145 F.3d 737, 741 (5th Cir. 1998); see also Huggs, Inc. v. LPC Energy, Inc., 889 F.2d 649, 653 (5th Cir. 1989). The Fifth Circuit has also held that, in construing an unambiguous contract, the parties' intent must be taken from the agreement itself, not from the parties' present interpretation, and the court must enforce the unambiguous contract as written. Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas, 208 F.3d 475, 485 (5th Cir. 2000)("Under Texas law,

unambiguous contracts must be enforced as written, with the intent of the parties being derived from the agreement itself."); U.S. v. Chromalloy American Corp., 158 F.3d 345, 350 (5th Cir. 1998)(when a contract is expressed in unambiguous language, the terms of the contract must be given their plain meaning and enforced as written); Certain Underwriters at Lloyd's of London v. C.A. Turner Constr. Co., 112 F.3d 184, 186 (5th Cir. 1997).

If the contract is not ambiguous, the Fifth Circuit has consistently held that the district court must give effect to the ordinary meaning of the words. The court may not impose a subjective interpretation onto the express language of the contract and in so doing "create an ambiguity where none exists." Rutgers, State University v. Martin Woodlands Gas Co., 974 F.2d 659, 662 (5th Cir. 1992).

Here, however, the Fifth Circuit departed drastically from the license's express language when it interpreted the WHA contract. The Fifth Circuit found the contract to be unambiguous. Despite this finding, the Fifth Circuit imposed a subjective construction onto the express language in the contract and did not enforce the contract as written. The Fifth Circuit therefore erroneously enforced a contract based on what it believed to be the unexpressed, "anticipated" intent of the parties.

2. The Fifth Circuit's Opinion Frustrates The Purpose Of The Copyright Act

This district court was constrained to construe the Owner/Architect Agreements in a manner consistent with the Copyright Act to preserve those rights not licensed by the licensor—here Petitioner. Fantastic Fakes, Inc. v. Pickwick Int'l, Inc., 661 F.2d 479, 482-83 (5th Cir. 1981); see also, Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1122 (9th Cir. 1999)(state law provides rules of contract construction only insofar as these rules do not interfere with federal copyright law and policy); Vault Corp., 847 F.2d at 269 ("when state law touches upon the area of [patent or copyright statutes], it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law")(quoting Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964)). The Fifth Circuit's affirmation of the district court's erroneous construction of the Owner/Architect Agreements frustrates the purposes of the Copyright Act since the decision usurps those rights specifically identified under 17 U.S.C. § 106.

Public policy interests can only be preserved by strictly reading a copyright license based on the license's express terms. Such policy concerns are identical to those observed by the circuit courts in confining the reading of a contract to its four corners. These policy concerns were articulated in Wilson Arlington Co. v. Prudential Ins. Co. of America:

If parties to an agreement could not rely on written words to express their consent to the express terms of the agreement, those words would become little more than sideshows in a circus of self-serving declaration as to what the parties to the agreement really had in mind.

912 F.2d 366, 370 (9th Cir. 1990).

The Fifth Circuit's opinion serves to cast uncertainty on the evaluation of the scope of the rights conveyed under the copyright laws. Under the Fifth Circuit's opinion, a copyright holder in the Fifth Circuit can no longer be confident that an explicit, unambiguous, express license of subject matter will not be construed to extend well beyond the license's four corners based on what rights a district court believed the parties "anticipated" should be conveyed.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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