

Fifth Circuit Issues Ruling Regarding Statutory Damages Under Copyright Law

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On January 9, 2020, the U.S. Court of Appeals for the Fifth Circuit issued a ruling rejecting the argument that unregistered copyrights may be eligible for statutory damages when subsequently registered if the defendant infringed the same work differently after the registration (*e.g.* copying vs. distribution).

The Fifth Circuit's ruling comes in response to litigation filed by Southern Credentialing Support Services, L.L.C. (herein, "Southern Credentialing") against Hammond Surgical Hospital, L.L.C., and Hammond Surgical Hospital Management Company, L.L.C. (herein collectively, "Hammond"). Southern Credentialing brought claims of copyright infringement against Hammond after it discovered Hammond had allegedly infringed 50% of its credentialing and re-credentialing packets used by hospitals to verify the credentials of applicant doctors.

Southern Credentialing registered a copyright for its original credentialing packet in February 2014 and registered a copyright for its recredentialing packet in July 2014. Soon after the registration of the re-credentialing packet in July 2014, Southern Credentialing filed suit against

Hammond for copyright infringement of its original credentialing packet and re-credentialing packet.

The Copyright Act of 1976 allows a copyright holder to elect statutory damages in an amount ranging from \$750 to \$30,000 per infringed work, with the possibility of \$150,000 per work for willful infringement. The Copyright Act's section 412 includes a limitation that a plaintiff cannot recover statutory damages for any infringement a defendant commences before the plaintiff registered the copyright.

During a bench trial, Southern Credentialing elected statutory damages. The court ruled that it could award statutory damages despite the Copyright Act's section 412 limitation because Hammond's infringement was "different in kind" from its infringement before the copyrights were registered. Hammond's preregistration infringement reproduced the copyrighted forms (violating 17 U.S.C. § 106(1)), whereas its post-registration infringement distributed the forms by making them publicly available on its website (violating 17 U.S.C. 106(3)). The court also issued a permanent injunction barring Hammond from infringing Southern Credentialing's copyrights. Hammond appealed the court's ruling to the Fifth Circuit.

The Fifth Circuit reversed the lower court's ruling, rejecting the argument that statutory damage awards may be awarded in situations when the defendant infringed the same work in a different fashion (*e.g.* copying vs. distribution) before and after registration of the copyrighted work.

The Fifth Circuit ruled that statutory damage awards are not available when a defendant violates one of six exclusive rights of a copyright holder preregistration and violates a different right in the same work after registration.

While the Fifth Circuit ruled that statutory damages were not available to the plaintiff in this instance, it stated that other awards such as actual damages and an injunction are remedies available to protect against future infringement.