

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA

V.

DANIEL DOVE,

Defendant.

Case No. 2:07cr00015

DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL
AND MOTION FOR NEW TRIAL IN THE INTEREST OF JUSTICE

COMES NOW Defendant Daniel J. Dove, by Counsel, to move this honorable Court for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c), or, in the alternative to order a new trial pursuant to Fed. R. Crim. P. 33, and, finally, in the event the Court grants the Defendant's a judgment of acquittal, to conditionally determine that a new trial be granted to the Defendant if the acquittal is later vacated or reversed pursuant to Rule 29(d).

I. Motion for Judgment of Acquittal.

1. Defendant submits that the Government did not present sufficient evidence to sustain a conviction for copyright infringement pursuant to 17 USC § 506 against the Defendant for the reason that the Government did not meet its burden to prove beyond a reasonable doubt that the Defendant was acting willfully pursuant to 17 USC § 506(a)(1). Although the Government presented evidence of reproduction and distribution of a copyrighted work, that by itself is not sufficient to found the specific intent required to establish willful infringement by the Defendant.

2. Willfulness creates an exception to the general rule of criminal law that ignorance of the law is no excuse. Cheek v. United States, 498 US 192, 200 (1991) *cited by* Safeco Insurance v. Burr, 124 S. Ct. 2201, 2209, n. 9 (2007), and “requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.” Cheek at 201. In this case, defendant placed at issue that “he knew of the duty purportedly imposed by [17 USC § 506].” Cheek at 201-02. Thus, the standard is not whether a defendant knew of any legal duty, but whether he specifically knew of the duty imposed by 17 USC § 506 as written at the time that he was allegedly violating the criminal copyright statute.

3. Defendant presented significant evidence that he did not have actual knowledge that he was violating the criminal copyright statute, 17 USC § 506, and that he had a good faith belief that if his activities did not constitute “commercial advantage or private financial gain” as stated in the text of 17 USC § 506(1)(A). The Government did not present evidence that the defendant had actual knowledge of a legal duty under the criminal copyright statute, because it could not present evidence that defendant had actual knowledge that the expectation of receiving other copyrighted works constituted financial gain, as that commonly understood term is technically and legally defined in 17 USC § 101. Defendant submits that the language regarding the expectation of receipt of other copyrighted works is not included in 17 USC § 506(a)(1), nor is it included in the separate “Definition” section of the statute at 17 USC § 506(a)(2)(3). Because the statute requires willfulness, a mistaken interpretation of the law is an excuse, and ignorance of the legal definition of “financial gain” does not constitute grounds for convicting a defendant pursuant to the 17 USC § 506.

4. In short, the Government did not prove that the Defendant did not have a bona fide misunderstanding of 17 USC § 506.

5. A defendant's bona fide misunderstanding of the law does not have to be "objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the *legal duty at issue*." Cheek at 203 (emphasis added). "Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering [the defendant's belief]." Id. The Supreme Court interprets willfulness to require proof of knowledge of the law [i.e, the legal duty at issue]," Cheek at 205, and the Government has clearly not proved beyond a reasonable doubt that the Defendant had actual knowledge of the legal duty imposed by 17 USC § 506, nor that he specifically intended to violate the imposed duty.

6. With regards to the conviction of the Defendant pursuant to 18 USC § 371, the same analysis applies: the Government's evidence was insufficient as a matter of law to prove that that Defendant had actual knowledge that the purpose of Elite Torrents.Org was to willfully infringe on copyright in the context of his understanding of the meaning of 17 USC § 506, nor was the evidence sufficient to establish that the Defendant intentionally joined or assisted in an illegal operation, where to his knowledge and belief that organization was not in violation of the criminal copyright statute. He could not have intentionally joined an illegal organization he believed to be legal: even if in fact that organization was acting illegally, pursuant to 17 USC § 506 the Government still must establish that the Defendant's participation was willful. The Government did not meet its burden to prove the Defendant's specific intent to be involved in a criminal organization or to accomplish acts in furtherance of a criminal motive as far as the Defendant understood the definition of criminal purposes pursuant to 17 USC § 506.

II. Motion for New Trial in the Interest of Justice.

A. Jury Instructions Regarding Willfulness.

7. The jury instructions submitted to the jury improperly included Instruction 25A on willful blindness. Defendant objected to the inclusion of this instruction on two bases: 1) that the timing of the proposed instruction was too late for the Defendant to adequately consider and analyze the instruction; 2) that the instruction contradicted the requirement of willfulness in 17 USC § 506.

8. The willful blindness instruction proposed by the Government was not provided to the Defendant until the conclusion of the evidence and immediately prior to closing arguments and jury deliberations. It was not included in the Government's proposed instructions nor in the initial final instructions prepared by the Court. The Defendant did not object to the instruction on willfulness because it appeared to adequately state the law of willfulness, and Defendant was not prepared to address the issue of willful blindness at the time it was presented, nor did Defendant have the opportunity to adequately investigate and prepare argument on the issue of willful blindness after it was proposed and before it was submitted to the jury.

9. As Defendant argued, however, the proposed instruction did not properly state the legal requirement of willfulness pursuant to 17 USC § 506.

10. As referenced supra in paragraph 5, a defendant's bona fide misunderstanding of the law does not have to be "objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." Cheek at 203. "Characterizing a particular belief as not objectively reasonable

transforms the inquiry into a legal one and would prevent the jury from considering [the defendant's belief]." Id.

11. The provision of the instruction on willful blindness to the jury in this case is strikingly analogous to Cheek, where the jury instructions included an instruction that "only an objectively reasonable misunderstanding of the law negates the statutory willfulness requirement." Cheek at 198. The court in that case also instructed the jury that "persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law." Id. at 197-98. The Seventh Circuit had adopted an approach that a defendant's "good-faith misunderstanding of the law negate[d] willfulness only if the defendant's beliefs [we]re objectively reasonable;" "even actual ignorance [was] not an excuse." Id. at 198. The Supreme Court reversed the lower courts in Cheek and the policy of the Seventh Circuit regarding willfulness: "We thus disagree with the [Seventh Circuit's] requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." Id. at 203.

12. Instruction 25A on willful blindness essentially mirrored the Seventh Circuit's instructions on objective reasonableness by instructing the jury that it could find that the Defendant acted willfully if it concluded that "the evidence proves beyond a reasonable doubt that he closed his eyes to what would otherwise been obvious to him." The instruction inherently creates a presumption in the minds of the jury that a defendant's subjective intent can be ignored if the jury finds that intent to be objectively unreasonable, thereby essentially eviscerating the requirement of 17 USC § 506 that a particular defendant have specific intent to willfully violate the criminal copyright statute.

13. In addition, the Defendant objected to the replacement proposed by the Government in the Court's proposed Final Jury Instructions Nos. 15 and 17 that weakened the required finding of willfulness for the conspiracy charge against the Defendant.

14. Defendant objected to the replacement of "willfully" with "knowingly" on line 6 of proposed Instruction No. 15 and line 1 of proposed Instruction No. 17. Defendant submits that not only his knowledge of the willfulness of the conspiracy to commit an illegal act he knows to be illegal must be proved, but also that he willfully participated in that conspiracy, given the willfulness requirement of the underlying statute, namely 17 USC § 506.

15. Defendant also unsuccessfully requested that line 13 of Instruction 25 be changed from "knowingly" to "willfully" with regards to the Defendant's intent to aid or abet in the commission of a copyright violation, in order to accurately reflect the requirements of 17 USC § 506. See United States v. Rose, 149 U.S.P.Q. 820 (S.D.N.Y. 1966):

In order to aid and abet another to commit a crime, it is necessary that a defendant willfully participate in it as something that he wishes to bring about, and that he *willfully* seek by some action of his to make it succeed. ... [i]f you find that the defendant *willfully* associated himself with others who were [criminally infringing copyright] and that he *willfully* participated in their venture... you may find that the defendant was an aider and abettor....

cited in Nimmer on Copyright, § 15.01[A][2].

B. Hearsay Evidence.

16. Finally, Defendant submits that it was erroneous to exclude hearsay evidence with regards to statements made by Rudy O. Corella, a/k/a Krylon that were material to the Defendant's defense pursuant to Fed. R. Evid. 804 once it found that the Declarant was unavailable according to Rule 804.

WHEREFORE, the Defendant respectfully prays that this Honorable Court grant the Defendant a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c), or, in the alternative to order a new trial pursuant to Fed. R. Crim. P. 33, and, in the event the Court grants the Defendant's a judgment of acquittal, to conditionally determine that a new trial be granted to the Defendant if the acquittal is later vacated or reversed pursuant to Rule 29(d).

Respectfully submitted,
Daniel J. Dove

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CERTIFICATE OF SERVICE

1). I hereby certify that on July 11th, 2008, I caused to be electronically filed the above and foregoing **DEFENDANT'S MOTIONS FOR ACQUITTAL AND NEW TRIAL** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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/s/ Michael B. Gunlicks
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Including the instruction on willful blindness prevented the jury from considering The Supreme Court interprets willfulness to require proof of knowledge of the law [i.e, the legal duty at issue],” Cheek at 205.and the Government has clearly not proved beyond a reasonable doubt that the Defendant had actual knowledge of the legal duty imposed by 17 USC § 506, nor that he specifically intended to violate the imposed duty.