

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic to the left of the firm's name. The name "astrachan gunst thomas" is written in a lowercase, sans-serif font, with "astrachan" and "gunst" in black and "thomas" in blue.

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BANKRUPTCY AND COPYRIGHT INFRINGEMENT

By: Jim Astrachan

Zoltar really wasn't too bad a guy, all things considered. He paid his mortgage on time, came home early enough to take his kids to a ball game, although it had become an expensive and disappointing outing, and joined and kept active on the boards of several local charities, where he did more than just lend his name and money; he attended meetings and worked his committee assignments. Not a bad guy at all.

His professional life was pretty good also. People weren't sure exactly what he did but they knew he worked in the movie or entertainment industry. From outward appearances his business was successful, and he had the material spoils of that success. Big house in a nice neighborhood, fancy foreign car, and a second home at the beach. His vacations were the envy of his friends.

Zoltar was also a tough and cunning businessman who was well acquainted with adversity. Twice before in his career he had severely overreached in an effort to grow other businesses and found himself deeply in debt. In both instances he filed for bankruptcy protection and had quickly reestablished himself. This time, his business posed no personal financial risks. This time, he used other people's money to grow his film business and all appeared well.

Zoltar's only problem was that he didn't own all of the films he reproduced and distributed. A minor technicality in his mind for sure, but he was not a man educated in the complexities of copyright law and he did not intend to learn now. A dozen of his best sellers were reproduced from tapes he had bought and the copyright to these movies belonged to another person.

When the owner of the films that Zoltar copied and sold, who also distributed them, began to see its sales decline it learned that it had an illegal competitor who was selling bootlegged films for less and siphoning off business. A letter was dispatched from the copyright owner's lawyer advising Zoltar of the owner's copyrights and its

exclusive right to reproduce and distribute the films. The lawyer even saved his correspondent the trouble of verifying the existence of the copyright by enclosing copies of each registration.

Within a week after receiving the lawyer's letter Zoltar reproduced another 500 copies of the films and sent them to his retailers. He then responded to the lawyer in a very gentle manner that he was not aware of the copyrights and that he thought he had the right to reproduce and sell the films because he thought they were in the public domain. He added at the end of his letter that he would be happy to discuss with the lawyer or his client the purchase of his inventory. He added that for some "monetary deal" he would agree not to reproduce or sell any more of these films. After all, he wrote, he had made a considerable investment in his distribution business and these dozen films were the jewels in his crown.

Zoltar continued to illegally reproduce and distribute films and several weeks later the final warning letter was dispatched from the lawyer's office. Not believing anyone would sue him merely for reproducing and selling movies, and reveling in the profits earned from his venture, Zoltar, a pillar of his community, continued his venture. And one evening a man was waiting for him by his car at the office parking lot and served him legal papers. Zoltar and his company had been sued for copyright infringement.

The District Court granted summary judgment on the issues of ownership and copying. Zoltar found himself in front of a jury that was to determine whether the infringement was willful. The jury was instructed, to the effect, that to prove willful infringement, the plaintiff must prove by a preponderance of the evidence that Zoltar and his company knew they were infringing plaintiff's copyrights or that they acted in reckless disregard of whether they were doing so.

After a short deliberation, the jury returned verdicts that Zoltar and his company had willfully infringed the plaintiff's copyrights by copying and distributing the dozen films and awarded statutory damages. Judgment was entered for \$1,200,000 plus attorneys' fees and costs. The final judgment was \$1,450,000.

Zoltar, who had twice before in his business career relied on bankruptcy to help him start over, filed a bankruptcy petition. Zoltar's creditor responded with a complaint seeking to have Zoltar's judgment declared non-dischargeable on the grounds that it arose from conduct that was "willful and malicious."

Zoltar claimed his conduct was merely "reckless." The bankruptcy court applied collateral estoppel, on the issue of preclusion, holding that Zoltar was bound by the jury's determination that he was aware of the distributor's copyrights and nevertheless ordered or performed the duplication of the films. The court concluded that statutory damages, like punitive damages, would support finding of an "injury" under section 11

U.S.C. § 523(a)(6), that the facts established in the District Court were binding in the adversary proceeding, and that based on knowledge of the copyrights and the intentional duplication and sale, Zoltar acted with knowledge that injury was substantially certain to occur.

Zoltar appealed. An appellate panel concluded that a non-dischargeable injury need not be confined to physical damages; it can include injury to property rights, and that copyright infringement actions subsume certain tort actions. The panel reasoned that awards of statutory copyright damages serve both compensatory and punitive damages.

Was the award of statutory copyright damages for Zoltar's intentional copyright infringement a willful and malicious injury so as to avoid its discharge? Yes, the appellate panel held. The essence of copyright infringement is unauthorized copying, infringement is a codified injury to an intangible property interest, and infringement is willful where the infringer intends the consequence of his actions. Willfulness can be established by showing either knowledge of infringement or reckless disregard of the possibility of infringement, although reckless disregard is insufficient to establish willfulness under § 523(a)(6).

Unfortunately for Zoltar, he was made aware that someone else owned the copyrights to the twelve films when he made his final copies. And he knew he violated those copyrights to sell the films.

For poor Zoltar, three times was not a charm.

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