Electronic Frontier Foundation

MEMORANDUM

Date: June 25, 2009

To: Defense counsel in RIAA and MPAA individual file-sharing suits

From: Fred von Lohmann, Senior Staff Attorney

Re: Dischargeability of copyright judgments in personal bankruptcy

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The following is intended as background research that may be of interest to attorneys who are representing defendants in copyright infringement actions brought by music or movie industry plaintiffs based on allegations of peer-to-peer (P2P) file sharing.[1]

A. Executive Summary.

Debts arising from copyright infringement judgments are generally dischargeable in personal bankruptcy proceedings unless the creditor (i.e., the copyright owner) can prove that the judgment constitutes a debt for a "willful and malicious injury" within the meaning of 11 U.S.C. § 523(a)(6). Moreover, because the legal standards for "willful and malicious injury" differ from those governing "willful infringement" under the Copyright Act, even a willful infringement judgment may be dischargeable in bankruptcy.

These conclusions suggest that copyright owners may have difficulty preventing the discharge in bankruptcy of judgment debts against P2P file-sharers, at least where the copyright owner cannot demonstrate that the defendant had a subjective intent to harm the copyright owner by file-sharing.

B. Nondischargeability under Section 523(a)(6).

Debts arising from copyright judgments are generally treated like any other judgment debts in personal bankruptcy proceedings and may thus be discharged. However, where the judgment arises from a course of infringing conduct that is "willful and malicious" within the meaning of 11 U.S.C. § 523(a)(6), it will not be dischargeable.

Section 523(a)(6) provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt … for the **willful and malicious injury** by the debtor to another entity or to the property of another entity.

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[1] This memorandum summarizes general legal principles and is not intended as legal advice. Defendants are encouraged to engage their own counsel before relying on anything contained herein.

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The party seeking to establish an exception to the discharge (here, the copyright owner) bears the burden of proof and must establish nondischargeability by a preponderance of the evidence. *See Grogan v. Garner,* 498 U.S. 279, 289 (1991). To further the policy of providing a debtor with a fresh start in bankruptcy, exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor. *See In re Scarlata,* 979 F.2d 521, 524 (7th Cir. 1992). "Willfulness" and "malice" are independent necessary elements under § 523(a)(6). *See Albarran v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 711 (9th Cir. 2008); *In re Novotny,* 226 B.R. 211, 217-19 (Bankr. D.N.D. 1998); *but see Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 606 (5th Cir. 1998) (collapsing the "willful" and "malicious" prongs into a single inquiry).

An award of statutory damages under copyright law qualifies as an "injury" within the meaning of § 523(a)(6). *See Albarran v. New Form, Inc. (In re Albarran),* 347 B.R. 369, 384 (9th Cir.BAP 2006), *rev'd on other grounds sub. nom. In re Barboza*, 545 F.3d 702 (9th Cir. 2008); *Star's Edge, Inc. v. Braun (In re Braun)*, 327 B.R. 447, 452 (Bankr. N.D. Cal. 2005). By itself, however, "[p]roof of a copyright infringement under Title 17, U.S.C., does not necessarily provide sufficient proof of wrongdoing under 11 U.S.C. § 523(a)(6)." *In re Elms,* 112 B.R. 148, 151 (Bankr. E.D. La. 1990). Nor will res judicata principles automatically transform a copyright judgment into a nondischargeable debt—bankruptcy courts are entitled to make an independent inquiry into the merits of any underlying judgment in determining whether the requirements of § 523(a)(6) have been met. *See In re Watson,* 117 B.R. 291, 293 (W.D. Mo. 1990). Collateral estoppel (also known as "issue preclusion") principles can be applied, however, to establish the nondischargeability of a debt, if the bankruptcy court is satisfied that "the identical issue was raised and actually litigated in the prior case and that resolution of the issue was necessary to the judgment." *In re Chan,* 325 B.R. 432, 437 (N.D. Cal. 2005).

The rejection of res judicata, coupled with the requirements of collateral estoppel, suggests that default judgments, standing alone, will not be entitled to any weight in a § 523(a)(6) analysis, insofar as the issues relevant to willfulness and malice will not have been litigated in the prior case. *Cf. In re Watson,* 117 B.R. at 295 (finding that default judgment, even when bolstered by subsequent affidavits, did not satisfy § 523(a)(6)).

C. Willfulness.

According to the Supreme Court, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *See Kawaauhau v. Geiger,* 523 U.S. 57, 64 (1998).[2] A deliberate or intentional act that leads to injury is not sufficient to meet the requirement; the debtor must have subjectively intended the consequences of the act, not merely the act itself. *See id.* at 61. In other words, the

[2] The Court's holding in *Geiger* addressed several long-running disputes among the circuits regarding the scope of "willful and malicious" under § 523(a)(6). Accordingly, pre-*Geiger* precedents addressing § 523(a)(6) should be viewed with caution. *See generally In re Hibbs,* 161 B.R. 259, 261 n.1 (Bankr. C.D. Cal. 1993) (collecting ten pre-*Geiger* cases applying § 523(a)(6) to copyright judgments).

"willfulness" element limits nondischargeability under § 523(a)(6) to the category of injuries generally understood as "intentional torts." *See id.*

In *Geiger,* the Supreme Court did not clearly specify the scope of the term "intent," as applied to willful conduct. There appears to be general consensus, however, that the intent requirement is met "when it is shown either that the debtor had a subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct." *See, e.g., Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002) (emphasis in original).

Whether the "substantial certainty" prong states an objective or subjective standard has caused a split among various courts. The Sixth Circuit, for example, has stated that "the mere fact that [the debtor] should have known his decisions and actions put [the creditor] at risk is … insufficient to establish a 'willful and malicious injury'…. He must will or desire harm, or believe injury is substantially certain to occur as a result of his behavior." *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 465 n. 10 (6th Cir.1999). The Ninth Circuit also requires a showing of subjective intent. *See In re Su*, 290 F.3d at 1144 (requiring "either a subjective intent to harm, or a subjective belief that harm is substantially certain"). The Fifth Circuit, in contrast, has used an objective notion of substantial certainty, holding that "either objective substantial certainty or subjective motive" will suffice. *See In re Miller,* 156 F.3d at 603-04.

D. Malice.

In order to be "malicious" within the meaning of § 523(a)(6), the debtor must have acted in a manner that is "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will." *In re Krautheimer,* 241 B.R. 330, 341 (Bankr. S.D.N.Y. 1999) (citing *In re Stelluti*, 94 F.3d 84, 87 (2d Cir.1996)). "A 'malicious' injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *In re Su,* 290 F.3d at 1146-47 (quoting *Petralia v. Jercich (In re Jercich),* 238 F.3d 1202, 1209 (9th Cir. 2001)). "Malice may be constructive, that is, implied by the acts and conduct of the debtor in the context of [the] surrounding circumstances." *In re Krautheimer,* 241 B.R. at 341 (internal quotes omitted).

Because the Supreme Court in *Geiger* did not address the "malice" element of § 523(a)(6), most courts have continued to rely on pre-*Geiger* caselaw addressing "malice," at least insofar as it does not conflict with *Geiger*'s requirement of subjective intent. *See id.*; *In re Jercich*, 238 F.3d at 1209; *In re Wong,* 291 B.R. 266, 281 (Bankr. S.D.N.Y. 2003); *In re Salem,* 290 B.R. 479, 485 (S.D.N.Y. 2003).

In the wake of *Geiger*, there appears to be some redundancy in the "malice" analysis—it is difficult to imagine an intentional act aimed at causing harm that would not also qualify as "malicious" under the relevant standards. *See In re Miller,* 156 F.3d at 606 ("Where injury is intentional, as it now must be under [*Geiger*], it cannot be justified or excused."); *In re Novotny,* 226 B.R. at 217-19 (while bound by contrary 8th Cir. precedent, noting redundancy). However, the Ninth Circuit has rejected the theory that malice could be "implied" from a finding of willfulness. "Although there may be some overlap between the test for 'willfulness' and the test for 'malice'…the overlap does not

mean that the Bankruptcy Court can ignore entirely the malice inquiry. We require a separate analysis for each of the 'willful' and 'malicious' prongs." *In re Barboza*, 545 F.3d 702 (9th Cir. 2008). Practically speaking, this may only constitute a requirement of more factual findings by a bankruptcy court, but perhaps at the outer margin of the willfulness envelope (e.g., where "substantial certainty of injury" stands in for actual intent to cause harm), some "just cause or excuse" might intervene to dispel a finding of "malice."

E. Interaction between willful infringement and "willful and malicious".

Because the legal standards for "willful and malicious injury" under § 523(a)(6) are different from those governing "willful infringement" under the Copyright Act, a willful infringement judgment does not automatically satisfy the requirements for nondischargeability. *See In re Barboza,* 545 F.3d at 707. Accordingly, a bankruptcy court has an independent obligation to look behind a copyright judgment in determining a debtors' intent. *See id.* at 709-10.

The Supreme Court decision in *Geiger* makes it clear that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Geiger,* 523 U.S. at 64. Willful infringement under 17 U.S.C. § 504(c)(2), in contrast, can be based on a finding of reckless disregard, rather than a subjective intent to harm. *See In re Barboza,* 545 F.3d at 708 (noting that willful infringement may be based on 'reckless' behavior, which is "*not* sufficient to be considered willful" for purposes of § 523(a)(6)).

Moreover, in applying collateral estoppel principles, the bankruptcy court must consider who bore the burden of proof with respect to willfulness in the copyright case. In the bankruptcy court, it will be the creditor (i.e., copyright owner) that bears the burden of proof as to willfulness and malice. *See In re Chan*, 325 B.R. at 440 & n.5 (holding that a finding of willful infringement did not support collateral estoppel on a § 523(a)(6) claim due to the differing burdens of proof).

In short, a finding of willful infringement will not, by itself, support collateral estoppel with respect to willfulness or malice under § 523(a)(6). *See id.*; *In re Barboza,* 545 F.3d at 708 ("[I]f a finding of "willful" copyright infringement is based merely on reckless behavior, the resulting statutory award would not fit within the § 523(a)(6) exemption.").[3] A bankruptcy court, in examining the prior court's finding, must independently find (based either on prior factual findings or its own reexamination) that

[3] At least one pre-*Geiger* ruling held that a willful infringement verdict under the Copyright Act collaterally estops a debtor from contesting the "malice" element under 523(a)(6). *See In re Hibbs,* 161 B.R. at 268; *cf. In re Messier,* 51 B.R. 229, 231 (D. Colo. 1985) (concluding *after trial* that debtor had acted willfully and maliciously). This precedent is of dubious value in the wake of *Geiger.* Nevertheless, at least one post-*Geiger* court has found a defendant collaterally estopped from disputing nondischargeability on the basis of a simple statutory damages award. *See In re Braun,* 327 B.R. 447, 450 (Bankr. N.D. Cal. 2005) (likening statutory damages to sanctions, and holding that "[s]tatutory damages for copyright infringement are…indicative of injury and, therefore, are nondischargeable," even absent proof of actual damages).

the infringement was both willful and malicious for the purposes of § 523(a)(6).

Consequently, a finding of willfulness under the Copyright Act must be backed by specific factual findings regarding the subjective state of mind of the defendant to settle the question under § 523(a)(6) in a particular case. *See, e.g., In re Barboza*, 545 F.3d at 711 (finding a question of fact regarding intent where jury instructions permitted willful infringement based on recklessness); *In re Akhtar,* 368 B.R. 120, 134 (Bankr. E.D.N.Y. 2007) (debtor collaterally estopped from disputing willfulness and malice in light of facts supporting prior statutory damages award and contempt proceeding); *In re Ahmed,* 359 B.R. 34, 43-44 (E.D.N.Y. 2005) (collateral estoppel applied based on facts developed in prior summary judgment proceeding).

In short, whether any debt stemming from a copyright judgment is nondischargeable under § 523(a)(6) turns on the defendant/debtor's subjective state of mind, a topic on which the bankruptcy court may hold independent proceedings.