Electronic Frontier Foundation

MEMORANDUM

Date: April 16, 2003

To: Defendants'

From: Fred von Lohmann, Senior Staff Attorney

Re: Dischargeability of copyright judgments in personal bankruptcy

NOTE: This memo reflects initial research only. It should not be relied upon without further research and consideration of the specific facts of your case.

Because I expect that each defendant in the above actions may have questions regarding the dischargeability of copyright judgments in personal bankruptcy, I've assembled some preliminary research on the question.[1]

A. 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.

The party seeking to establish an exception to the discharge bears the burden of proof, *see In re Harasymiw,* 895 F.2d 1170, 1172 (7th Cir.1990), and must establish nondischargeability by a preponderance of the evidence, *see Grogan v. Garner,* 498 U.S. 279 (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).

By itself, "[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)." *See In re Elms,* 112 B.R. 148, 151 (Bankr. E.D. La. 1990)).

B. Willfulness.

The Supreme Court recently addressed the meaning of § 523(a)(6)'s "willfulness"

[1] There is currently a major bankruptcy bill pending before Congress. This memo does not address whether any of its provisions might alter the analysis.

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requirement, declaring that "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 "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. Subsequent courts appear to agree that "the willful injury requirement of § 523(a)(6) 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." *Bukowski v. Patel,* 266 B.R. 838, 843 (E.D. Wis. 2001) (quoting *Petralia v. Jercich (In re Jercich),* 238 F.3d 1202, 1208 (9th Cir. 2001) and noting similar holdings by 5th, 6th, and 8th Circuits); *In re Slomnicki,* 243 B.R. 644, 649 n.2 (W.D. Pa. 2000).

C. 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)). "Malice may be constructive, that is, implied by the acts and conduct of the debtor in the context of [the] surrounding circumstances." *Id.* (internal quotes omitted).

"Willfulness" and "malice" are distinct elements under § 523(a)(6) and are evaluated independently. *See In re Thiara,* 285 B.R. 420, 433 (9th Cir. BAP 2002); *In re Novotny,* 226 B.R. 211, 217-19 (Bankr. D.N.D. 1998). Because the Supreme Court did not address the "malice" element of § 523(a)(6) in *Geiger,* 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 Wong,* 2003 WL 1869890 at *10 (Bankr. S.D.N.Y. Mar. 25, 2003); *In re Salem,* 290 B.R. 479, 485 (S.D.N.Y. 2003); *In re Krautheimer,* 241 B.R. 330, 341 (Bankr. S.D.N.Y. 1999).[3]

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

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[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).

[3] *But see In re Miller*, 156 F.3d 598, 606 (5th Cir. 1998) (Fifth Circuit holding that the "just cause or excuse" standard has been displaced by Geiger and collapsing the "willful" and "malicious" prongs into a single inquiry).

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). 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."

D. Interaction between willful infringment and "willful and malicious".

At least one pre-*Geiger* case held that a willful infringement verdict under the Copyright Act will collaterally estop a debtor from contesting the "malice" element under § 523(a)(6). *See In re Hibbs,* 161 B.R. at 268. The continuing vitality of this view in the wake of *Geiger* is open to question, as a finding of willful infringement under 17 U.S.C. § 504(c)(2) can be based on a finding of reckless disregard, rather than a subjective intent to harm. *See National Football League v. Primetime 24 Joint Venture,* 131 F.Supp.2d 458, 475 (S.D.N.Y. 2001). Of course, a finding of willfulness under the Copyright Act, if backed by specific jury findings regarding the subjective state of mind of the defendant, may well be enough to settle the question under § 523(a)(6) in a particular case.

There are very few post-*Geiger* cases applying § 523(a)(6) to copyright judgments. It appears safe to say, however, that the legal standards for "willfulness and malice" under § 523(a)(6) of the Bankruptcy Act are not identical to those for "willful infringement" under § 504(c)(2) of the Copyright Act. As a result, any outcome with respect to the latter should not automatically determine the outcome of the former. In other words, a willful infringement judgment does not necessarily translate into a nondischargeable debt. At the same time, neither does a plaintiff's failure to establish willfulness under § 504(c)(2) inevitably make the resulting debt dischargeable. Whether any debt stemming from a copyright judgment qualifies for nondischargeability under § 523(a)(6) will turn on the underlying factual findings relating to the defendant's subjective state of mind.