

**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 REPLY TO THE GOVERNMENT’S RESPONSE TO 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, in reply to the Government's Response to the Defendant's Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29(c), and, in the alternative Motion for 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 resubmits 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. Cheek v. United States, 498 US 192, 200 (1991) *cited by* Safeco Insurance v. Burr, 124 S. Ct. 2201, 2209, n. 9 (2007), “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. “[T]he issue is whether the defendant knew of the duty purportedly imposed *by the provision of the statute or regulation* he is accused of violating,” Id. at 201-02 (emphasis added). Thus, the standard is not whether the 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. The issue of whether the Defendant might have violated the provision of the law governing a civil violation of copyright law, i.e. reproducing and distributing copyrighted works without authorization, is separate and distinct from the criminal provision requiring that the intent be for commercial advantage or private financial gain. 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 his activities did not constitute “commercial advantage or private financial gain” as stated in the text of 17 USC § 506(1)(A).

4. The evidence of the alleged willfulness of the Defendant that was cited by the Government at trial and in its Response arguably demonstrate that the Defendant might have been aware that he was reproducing and distributing works without authorization from the copyright holders: But 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 “Definitions” section of the statute at 17 USC § 506(a)(2)(3).

5. Because the statute requires willfulness, a mistaken interpretation of the duty purportedly imposed *by the provision of the statute or regulation* he is accused of violating, Cheek at 201-02 (emphasis added), 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.

6. Thus, the Government did not prove that the Defendant did not have a bona fide misunderstanding of 17 USC § 506. 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.

7. Accordingly, the Government also 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: The Government’s evidence was insufficient as a matter of law to prove that that Defendant had actual knowledge that the purpose of EliteTorrents.Org was to willfully infringe on copyright with the purpose of “commercial advantage or private financial gain” within the Defendant’s understanding of those terms, 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 that organization was in fact acting illegally, pursuant to 17 USC § 506 the Government still must establish that the Defendant's participation was willful and the Government failed to do so.

8. The Defendant certainly recognizes that it was the jury's prerogative to weigh issues of credibility into its determinations. But the Defendant submits that given the evidence presented, it was insufficient as a matter of law to in fact determine that Defendant acted willfully to violate 17 USC § 506 or to commit conspiracy to do so. The evidence might arguably have been sufficient to establish that Mr. Dove violated the civil copyright statute, but it was clearly and absolutely insufficient to establish that he willfully violated 17 USC § 506 for the specific intended purpose of commercial advantage or private financial gain.

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

A. Jury Instructions Regarding Willfulness.

9. Given the highly technical nature of the legal standard for determining a violation of criminal copyright law, the instructions issued to the jury did not adequately represent the legal standard necessary to convict the Defendant, and improperly allowed the jury to equate knowing behavior with willful behavior, and reduced the evaluation of willfulness into a determination of the Defendant's objective reasonableness instead of a true inquiry into the Defendant's subjective state of mind.

10. 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.

11. 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. Given the Government's knowledge that willfulness is an element of the offenses charged and that a belief by the Defendant in the legality of his actions was a defense to the offenses charged, it was prejudicial to the Defendant for the Government to omit a willful blindness instruction in its initial submission of instructions to the Court, and to then suddenly propose an instruction with absolutely no notice to the Defendant, and after the Defendant had already presented his evidence within the framework of the instructions proposed by the Government, and then subsequently by the Court.

12. As previously argued by the Defendant, he had not objected to the proposed instruction on willfulness because it appeared to adequately state the law of willfulness, and Defendant was not prepared to address the proposed instruction of willful blindness at the time it was presented, nor did Defendant have the opportunity to adequately prepare argument on the willful blindness instruction after it was proposed and before it was submitted to the jury.

13. In addition, the proposed instruction did not properly state the legal requirement of willfulness pursuant to 17 USC § 506. Unlike the money laundering cases cited by the Government, 17 USC § 506 has a specific requirement that the Defendant have knowledge that what he is doing is for "commercial advantage and private financial gain," not simply that he have knowledge that what he was doing was illegal and that he specifically intended to break the law. Thus, there is a greater degree of specific knowledge required that hinges in part on the Defendant's subjective understanding of the law, as in Cheek. Moreover, the requirement

imposed by 17 USC § 506 that the infringement is for “commercial advantage or private financial gain,” adds an additional element of willfulness regarding the meaning of the law, unlike the tax cases where the underlying issue is often whether or not the Defendant believed that they had to follow the law because they deemed it unconstitutional. See Cheek, United States v. Guay, 487 F.3d 840, 850-51 (11th Cir. 2007).

14. As argued previously, 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. “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.

15. Jury Instruction No. 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 created 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. As written, the instruction essentially allowed the jury to ignore whether the Defendant might not in fact have truly misunderstood the law, as however unreasonable such an assertion might appear.

16. 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.

17. 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.

18. With regards to line 13 of Instruction 25, that Defendant requested that it 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].

By including "knowingly" in the instruction in addition to "willfully," the instruction improperly watered down the strict requirements for willfulness in finding a violation of the criminal copyright statute and conspiracy to violate the same.

B. Hearsay Evidence.

19. 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.

20. Defendant submits that, at least for the sake of argument, the Court deemed that the declarant was unavailable given Defendant's efforts of trying to serve Mr. Corella for over a month through a private process server, the lack of residence information available for Mr. Corella through diligent searches, including multiple background searches, and the apparent intentional sequestration by Mr. Corella.

21. Though also not in possession of a trial transcript, Defendant submits that he argued in Court that the proposed testimony would go to the motive of the Defendant, i.e. his willfulness. Evidence presented by both sides clearly indicated that Mr. Corella was the individual also known as "Krylon," and that he was one of the three leading participants of the EliteTorrents.Org and a collaborator with the MPAA in its investigation of EliteTorrents.Org. Testimony by Mr. Dove of his efforts to leave the organization and Mr. Corella's statements and actions in relation thereto would go directly to Mr. Dove's willfulness, and would not have been merely cumulative but also directly supportive of the evidence in Mr. Dove's favor. Moreover, statements from Mr. Corella would have supported in establishing that Mr. Dove's degree of control in the alleged organization was less than that argued by the Government.

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,
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CERTIFICATE OF SERVICE

1). I hereby certify that on August 4th, 2008, I caused to be electronically filed the above and foregoing **DEFENDANT'S REPLY TO THE GOVERNMENT'S RESPONSE TO 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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