

16-2825-cv(L)

BWP Media USA Inc. v. Polyvore, Inc.

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In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2017

ARGUED: SEPTEMBER 19, 2017

DECIDED: APRIL 17, 2019

Nos. 16-2825-cv, 16-2992-cv

BWP MEDIA USA INC., DBA PACIFIC COAST NEWS, PACIFIC COAST NEWS,
NATIONAL PHOTO GROUP, LLC,
Plaintiffs-Appellants-Cross-Appellees,

v.

POLYVORE, INC.,
Defendant-Appellee-Cross-Appellant.

Appeal from the United States District Court
for the Southern District of New York.
No. 13 Civ. 7867 – Ronnie Abrams, *Judge.*

Before: NEWMAN, WALKER, and POOLER, *Circuit Judges.*

1 BWP Media USA Inc., Pacific Coast News, and National Photo Group, LLC
2 (collectively “BWP”), appeal from a memorandum and order of the United States
3 District Court for the Southern District of New York (Ronnie Abrams, J.) that
4 granted summary judgment to Polyvore, Inc. (“Polyvore”) on BWP’s copyright
5 claims for direct and secondary infringement and denied BWP’s cross-motion for
6 summary judgment on direct infringement. The district court also denied
7 Polyvore’s motion for sanctions under 17 U.S.C. § 505.

8 We conclude that the district court’s grant of summary judgment to
9 Polyvore on the direct infringement claim was error because there is a dispute of
10 material fact regarding whether Polyvore created multiple copies of BWP’s photos
11 that were not requested by Polyvore users. We further conclude that questions of
12 material fact preclude us from holding at this stage that Polyvore satisfied the
13 requirements for the Digital Millennium Copyright Act (DMCA) § 512(c) safe
14 harbor, even though BWP has not shown that Polyvore’s stripping of metadata
15 disqualifies it from safe harbor protection. We agree with the district court,
16 however, that Polyvore is entitled to summary judgment on BWP’s secondary
17 infringement claims of contributory, vicarious, and inducement of infringement
18 because the district court found that BWP abandoned those claims. And we find

no error in the district court's decision not to sanction BWP. We therefore AFFIRM the district court's grant of summary judgment dismissing BWP's secondary infringement claims, AFFIRM the denial of attorney's fees, VACATE the judgment as to direct infringement, and REMAND for further proceedings pursuant to the principles and procedures set out *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994).

Judges Walker, Newman and Pooler concur in separate opinions.

CRAIG B. SANDERS, Sanders Law, PLLC, Garden City, NY, *for Plaintiffs-Appellants-Cross-Appellees*.

ORIN SNYDER (Ester Murdukhayeva, *on the brief*), Gibson, Dunn & Crutcher LLP, New York, NY, *for Defendant-Appellee-Cross-Appellant*.

Robert Reeves Anderson, Arnold & Porter LLP, Denver, CO, John C. Ulin, Kathryn W. Hutchinson, Stephanie S. Roberts, Arnold & Porter LLP, Los Angeles, CA, *for amicus curiae*, Copyright Alliance, *in support of Plaintiffs-Appellants-Cross-Appellees*.

Seth D. Greenstein, Constantine Cannon LLP, Washington, D.C., *amici curiae*, The Consumer Technology Association and The Computer & Communications Industry Association, *in support of Defendant-Appellee-Cross-Appellant*.

Mitchell L. Stoltz, Daniel Nazer, Kit Walsh, Electronic Frontier Foundation, San Francisco, CA, *for amici curiae*, Electronic Frontier Foundation, Center for Democracy and Technology,

1 and Public Knowledge, *in support of Defendant-Appellee-Cross-*
2 *Appellant.*

3 Kelly M. Klaus, David J. Feder, Munger, Tolles & Olson LLP,
4 Los Angeles, CA, *for amicus curiae*, Motion Picture Association
5 of America, Inc., *in support of neither party.*

6

7 PER CURIAM:

8 BWP Media USA Inc., Pacific Coast News, and National Photo Group, LLC
9 (collectively “BWP”) appeal from a memorandum and order of the United States
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8 infringement claims, AFFIRM the denial of attorney's fees, VACATE the judgment
9 as to direct infringement, and REMAND for further proceedings pursuant to the
10 principles and procedures set out *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994).
11 We request that the district court file its response within 60 days from the issuance
12 of this opinion or as soon as practicable thereafter, and that upon such
13 determination, the parties promptly notify the clerk of this court, whereupon
14 jurisdiction will be restored to this court.

15 The facts are set forth in Judge Walker's separate concurring opinion, which
16 also specifies the questions of material fact that remain for determination by the
17 district court. Judge Newman concurs in the result with a separate opinion. Judge
18 Pooler concurs in the result with a separate opinion.