[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT
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No. 14-11058
Non-Argument Calendar
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D.C. Docket No. 6:11-cv-00137-ACC-DAB

INDYNE, INC.,

Plaintiff-Appellant,

versus

ABACUS TECHNOLOGY
CORPORATION,
JERRY RENINGER,
MATTHEW BOYLAN,

Defendants-Appellees.

_____

Appeal from the United States District Court
for the Middle District of Florida
_____

(September 24, 2014)

Before ED CARNES, Chief Judge, TJOFLAT and ROSENBAUM, Circuit Judges.

PER CURIAM:

InDyne, Inc. appeals the district court's order awarding attorney's fees to the defendants in this copyright case.

I.

InDyne brought a claim for copyright infringement against Jerry Reninger, Matthew Boylan, and Abacus Technology (collectively Abacus). InDyne alleged that Abacus had infringed InDyne's copyright over its Program Information Management System (PIMS) software. That claim arose from the fact that Abacus, while setting up a website for NASA, had copied portions of the PIMS software. The district court granted summary judgment to Abacus on the infringement claim, concluding that InDyne had not presented evidence sufficient to allow a reasonable jury to find that the elements of InDyne's software that Abacus had copied were original and thus deserving of copyright protection. We affirmed that decision. InDyne, Inc. v. Abacus Tech. Corp., 513 F. App'x 858 (11th Cir. 2013) (unpublished).

Under 17 U.S.C. § 505, the district court then ordered InDyne to pay Abacus' reasonable attorney's fees. InDyne, Inc. v. Abacus Tech. Corp., No. 6:11-cv-137-Orl-22DAB, 2014 WL 1400658 (M.D. Fla. Feb. 25, 2014). The district court identified three factors justifying its decision to award those fees. First, it

ruled that InDyne's decision "to file a copyright infringement claim even though it

did not have a copy of the copyrighted material" was "objectively unreasonable."

Id. at *9. Second, it found that InDyne's motivation in bringing the suit was

"questionable." Id. Third, it reasoned that an award of attorney's fees would

further the purposes of the Copyright Act because it would deter future litigants

from suing for infringement of software copyrights without being able to produce

the software code. See id. at *9–10. Taken together, these factors "weigh[ed] in

favor of an imposition of fees." Id. at *10. InDyne now appeals that order.

II.

A district court may award "a reasonable attorney's fee to the prevailing

party" in a civil copyright-infringement action. 17 U.S.C. § 505. The district court

awards § 505 attorney's fees "as a matter of the court's discretion." Fogerty v.

Fantasy, Inc., 510 U.S. 517, 534, 114 S.Ct. 1023, 1033 (1994). In deciding

whether to make such an award, the court considers "whether imposition of

attorney's fees will further the goals of the Copyright Act, i.e., by encouraging the

raising of objectively reasonable claims and defenses, which may serve not only to

deter infringement but also to ensure that the boundaries of copyright law are

demarcated as clearly as possible." MiTek Holdings, Inc. v. Arce Eng'g Co., Inc.,

198 F.3d 840, 842–43 (11th Cir. 1999) (alteration and quotation marks omitted).

Courts consider factors such as "frivolousness, motivation, objective

unreasonableness (both in the factual and in the legal components of the case) and

the need in particular circumstances to advance considerations of compensation

and deterrence," if the application of those factors furthers the purposes of the

Copyright Act. Fogerty, 510 U.S. at 534 n.19, 114 S.Ct. at 1033 n.19 (quoting

Lieb v. Topstone Indus., Inc., 788 F.2d 151, 156 (3d Cir. 1986)). We review an

award of Copyright Act attorney's fees for an abuse of discretion. Montgomery v.

Noga, 168 F.3d 1282, 1303 (11th Cir. 1999).

InDyne first contends that Abacus is a bad actor that committed "massive

copyright infringement" against InDyne and "got away with it." InDyne thus

asserts that the district court abused its discretion because under those

circumstances, rewarding Abacus with attorney's fees would not serve the

purposes of the Copyright Act. But that contention is contrary to the district

court's finding, which we previously affirmed, that InDyne could not prove — and

Abacus was therefore not liable for — copyright infringement.[1] InDyne's bare

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[1] The conclusion that Abacus is not liable for copyright infringement is the law of the case. Under the law-of-the-case doctrine, an appellate court's findings of fact and conclusions of law are "generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." This That & the Other Gift & Tobacco, Inc. v. Cobb Cnty., 439 F.3d 1275, 1284 (11th Cir. 2006) (quotation mark omitted). The doctrine further bars relitigation of issues decided by necessary implication, even if they were not addressed explicitly. See id.; Transamerica Leasing, Inc. v. Inst. of London Underwriters, 430 F.3d 1326, 1331 ("While the doctrine encompasses only those issues previously determined, the law is clear that it comprehends things decided by necessary implication as well as those decided explicitly") (quotation marks and alteration omitted). Our opinion affirms "on the basis of the thorough and well-reasoned opinion of the district court," which found Abacus not liable for copyright infringement. InDyne, 513, F. App'x at 858; see also InDyne, 876 F. Supp. 2d at 1293 (granting summary judgment to Abacus).

assertion that Abacus behaved badly is an invitation to relitigate the already-decided merits of this case, not a ground for reversing the award of attorney's fees.

Second, InDyne contends that the district court abused its discretion because InDyne's decision to sue despite lacking key evidence was not objectively unreasonable. To survive a motion for summary judgment, a party must produce evidence "such that a reasonable jury could return a verdict" for it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). But when it sued, InDyne no longer had a copy of the copyrighted version of the PIMS software or even a clear software revision history. Without the software and without a revision history, InDyne had insufficient evidence to show which parts of the copyrighted work were protectable.[2]

InDyne claims that it relied on our decision in Montgomery v. Noga, 168 F.3d 1282, 1303 (11th Cir. 1999), for the proposition that it could have proved the content of its copyrighted work using witness testimony. But Montgomery does

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[2] As one element of its prima facie case, InDyne had to show that the parts of code Abacus copied were protectable "original works of authorship." Not all elements of every copyrighted work are protected. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348, 111 S.Ct. 1282, 1289 (1991) ("[T]he mere fact that a work is copyrighted does not mean that every element of the work may be protected."). Computer code, for example, often includes instructions that are unprotectable "'ideas' or are dictated by efficiency or external factors, or [are] taken from the public domain" — instructions that are, in other words, not protectable under copyright law. InDyne, 876 F. Supp. 2d at 1287; see also 17 U.S.C. § 102 ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .").
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not stand for that proposition. There, we were able to review the software itself

and a detailed revision history to assess whether the updated software exhibited

sufficient originality to merit copyright protection. See id. at 1290–91. Here, by

contrast, InDyne could not show the court the software or a revision history for its

"chameleon-like," "constantly morphing" software, without which it could not

prove its prima facie case. InDyne, 876 F. Supp. 2d at 1280. The district court

therefore did not abuse its discretion when it ruled that InDyne's decision to bring

this suit without proof of an element of its prima facie case was objectively

unreasonable.

Finally, InDyne disputes the district court's conclusion that its motives were

"questionable." But we need not address that finding because the district court

noted that even if it had found that this factor weighed in favor of InDyne, the

other factors outweighed it. InDyne, 2014 WL 1400658, at *9 n.7; cf. Fed. R. Civ.

P. 61 ("At every stage of the proceeding, the court must disregard all errors and

defects that do not affect any party's substantial rights.").

In short, the district court did not abuse its discretion in awarding Abacus its

reasonable attorney's fees. In doing so, it appropriately weighed the objective

unreasonableness of InDyne's decision to bring suit, InDyne's apparent

motivation, and the need to deter future litigants who would sue for copyright

infringement without producible evidence of their copyrighted work.

III.

The district court's award of attorney's fees is **AFFIRMED**. The parties'

unopposed motions to file out of time are **GRANTED**. Abacus' motion for

damages under Federal Rule of Appellate Procedure 38 is **DENIED**.[3]

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[3] We conclude that InDyne's appeal is not frivolous, and we therefore deny Abacus' Rule
38 motion for damages.   See Fed. R. App. P. 38 ("If a court of appeals determines that an appeal
is frivolous, it may . . . award just damages and single or double costs to the appellee.").