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5th Circuit: failure to mitigate damages not a complete defense in copyright cases

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(Reuters) - Addressing a novel legal question, a federal appeals court on Wednesday said failure to mitigate is not a complete defense to liability for statutory damages for copyright infringement.

The 5th U.S. Circuit Court of Appeals set aside a \$585,000 jury verdict in favor of the publisher of an energy industry newsletter that had accused an investment house of passing around unauthorized copies.

The court gave the publisher, Energy Intelligence Group (EIG), an opportunity to seek additional damages on remand, saying the trial judge erred in instructing jurors that EIG was not entitled to recover damages for acts of infringement that could have been avoided through reasonable effort.

"We really appreciate the court's consideration of the issues," said Robert Powley of Powley & Gibson, EIG's counsel.

Representatives of the defendant, Kayne Anderson Capital Advisors, did not respond to a request for comment.

New York-based EIG publishes Oil Daily, a premium newsletter for the petroleum industry. One of its subscribers was Kayne Anderson, a Los Angeles-based investment firm focused on the energy industry.

In 2014, an assistant at Kayne Anderson included an EIG employee on email correspondence that suggested the investment firm was widely sharing the newsletter in violation of a subscription agreement.

EIG sued Kayne Anderson that year, alleging copyright infringement.

EIG brought copyright cases around the same time against other clients, including Houston energy companies Enterprise Products Partners LP and Cheniere Energy Inc. Those cases settled on confidential terms.

In late 2017, when the case went to trial, U.S. District Judge Sim Lake in Houston instructed jurors that EIG could "not recover for any item of damage that they could have avoided through reasonable effort."

Kayne Anderson argued that EIG had pursued a litigious business strategy of waiting for infringements to pile up and then seeking outsized statutory damages.

The jury found that Kayne Anderson infringed 1,646 individual Oil Daily works, but that EIG failed to mitigate its copyright damages and could have avoided 1,607 of those 1,646 acts of infringement through reasonable diligence.

That finding resulted in EIG, which had sought about \$25 million, winning just \$585,000 in statutory damages plus \$2.6 million in attorneys' fees.

EIG argued on appeal that the judge had erred in finding that failure to mitigate is not a complete defense to liability for statutory damages for copyright infringement.

The 5th Circuit agreed in Wednesday's decision, saying failure to mitigate is a relevant factor in deciding what statutory damages ought to be imposed, but should not be an absolute bar.

The appeals are Energy Intelligence Grp, Inc et al v. Kayne Anderson Capital et al, No. 18-20350 and 18-20615.

For Kayne Anderson: W. Scott Hastings of Locke Lord

For EIG: Robert Powley of Powley & Gibson

---- **Index References** ----

Company: CHENIERE ENERGY INC; ENERGY INTELLIGENCE GROUP INC; ENTERPRISE PRODUCTS PARTNERS LP; KAYNE ANDERSON ENERGY DEVELOPMENT CO; KAYNE ANDERSON CAPITAL ADVISORS LP; LOCKE LORD LLP

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