

## Ninth Circuit Reverses Class Certification in Copyright/Bootlegging Dispute

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In a case that bodes well for defendants in putative copyright class actions, the Ninth Circuit last week, after granting a motion for interlocutory appeal, reversed a district court's decision certifying two classes of performers and composers who alleged that online concert archive Wolfgang's Vault had violated federal copyright and anti-bootlegging laws by streaming recordings of live rock shows. *Kihn et al. v. Bill Graham Archives LLC et al.*, No. 20-17397, 2022 WL 18935 (9th Cir. Jan. 3, 2022). This was the first time the Ninth Circuit has ever addressed class certification in the copyright context. A team of Winston & Strawn lawyers, led by Michael Elkin, with support from partners Erin Ranahan and Jeff Wilkerson, and associate PJ Sauertig, represented the appellants.

The named plaintiffs, rock musician Greg Kihn and associated entities, brought claims for copyright infringement and bootlegging, claiming that they never consented to the initial recording or later distribution of their performances. Wolfgang's Vault, owned and operated by Bill Graham Archives, features recordings of hundreds of legendary rock concerts, including performances by "well-known artists such as the Rolling Stones, Janis Joplin, and the Grateful Dead." *Id.* at \*1. The collection has been described by the Wall Street Journal as "the most important collection of rock memorabilia and recordings ever assembled in one business."

Although the district court found that all the criteria for class certification under Federal Rule of Civil Procedure 23(b) (3) had been met, the Ninth Circuit disagreed, finding instead that individual issues predominated over those affecting the proposed classes and that the district court "failed to conduct the 'rigorous analysis' required for class certification ..." (*id.* at \*6–7).

In particular, Kihn, the Ninth Circuit held, had impermissibly "tailored the classes to the merits of his individual claims" by defining the classes to exclude recordings he had unquestionably consented to—a luxury that would not be afforded to other class members.

The Ninth Circuit further observed that there were "other ways in which Kihn's claims appear not to be typical, or not to present questions common to the classes" including "whether section 1101 [of the Copyright Act] even applies to recordings, such as Kihn's, that were made before the statute was enacted." *Id.* at \*7, n.3

The court also reversed the district court's certification of Rule 23(b)(2) classes for injunctive relief. "Some putative class members," the court noted, "are earning royalties from or have otherwise agreed to Defendants' distribution of their works, while others may wish to enter similar agreements." *Id.* at \*7. An injunction would have stopped the flow

of such payments to class members and—because Rule 23(b)(2) does not provide for opt-outs—the injunction thus would not necessarily “benefit[] all [class members] at once.” *Id.* at \*8. This holding could be significant in the future even outside the copyright context, in that it suggests the Rule 23(b)(2) inquiry must take into account the collateral consequences of the injunctive relief sought, and whether those consequences are beneficial to class members.

The *Kihn* decision is the latest case in a recent trend of well-reasoned decisions from the Ninth Circuit reversing class certification to be issued but not published. Nonetheless, the decision is significant in that it marks the first time the Ninth Circuit has considered class certification in a copyright case. The court’s finding that class certification was inappropriate due to the fact that “individual issues of license and consent would predominate” also has notable implications for future attempts to bring class action suits in the copyright context.

## Key Takeaways

- The Ninth Circuit observed that it will be difficult to satisfy the predominance requirement in copyright infringement and anti-bootlegging cases where the recordings at issue were made at numerous events over a period of years.
- Whether the anti-bootlegging section of the Copyright Act applies retroactively remains an open question in the Ninth Circuit.

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