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**Geophysical Serv. v. TGS-NOPEC Geophysical Co.**

United States Court of Appeals for the Fifth Circuit

September 13, 2019, Filed

No. 18-20493

**Counsel:** For Geophysical Service, Incorporated, Plaintiff - Appellant: Joel Benjamin Rothman, SRipLaw, P.L.L.C., Boca Raton, FL; Brent Taylor Caldwell, Matthew J. M. Prebeg, Ph. D., Prebeg, Faucett & Abbott, P.L.L.C., Houston, TX; Don Cruse, Law Office of Don Cruse, Austin, TX.

For TGS-NOPEC Geophysical Company, Defendant - Appellee: Melanie B. Rother, Peter C. Tipps, Norton Rose Fulbright US, L.L.P., Houston, TX.

**Judges:** Before CLEMENT, HAYNES, and WILLETT, Circuit Judges.

**Opinion**

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PER CURIAM:\*

Geophysical Service, Incorporated (“Geophysical”), a Canadian company that collects, prepares, and licenses offshore seismic data, appeals the grant of summary judgment against it on its copyright infringement claim. Because we agree with the district

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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court that Geophysical granted non-party the Canada-Newfoundland and Labrador Offshore Petroleum Board (the “Board”) an implied license to copy and distribute its speculative seismic data, we AFFIRM the judgment without reaching the parties’ other arguments.

### **I. Background**

Canada regulates the use of seismic surveys to explore for petroleum deposits off the Canadian shore. The 1960 Canada Oil and Gas Regulations required offshore seismic surveyors to obtain a permit before conducting surveying operations. After the surveys were conducted, the surveyors were required to submit the resulting seismic data to the government. This seismic data could then be released to the public after a set confidentiality period. The 1982 Canada Oil and Gas Act retained the Regulations’ submission requirements and lengthened the confidentiality period to five years.

In March 1982, Geophysical submitted a permit application (the “Offshore Program Notice”) to the Canadian government to conduct a seismic survey that resulted in the creation of the works at issue in this case (the “GSI Works”).<sup>1</sup> The precursor to the Board,

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<sup>1</sup> The application was actually submitted by Geophysical’s predecessor-in-interest, a Delaware corporation also called “Geophysical Service Inc.” Through various corporate sales, the Canadian Geophysical now owns the GSI Works and any copyrights in them that the Delaware corporation held. Because these sales do not

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the Canada Oil and Gas Lands Administration (the “Administration”), approved Geophysical’s application. The approved Offshore Program Notice refers to a 1979 publication called “Offshore Exploration.” Offshore Exploration explains the requirement that offshore surveyors submit seismic data to the government and provides that members of the public may purchase copies of the released data from the Administration after the lapse of the confidentiality period. Geophysical submitted the first copies of the GSI Works to the Administration in November 1982. Two months later, the Administration issued a report listing seismic data that it had released to the public and again describing how to request copies. Included in the list were Geophysical’s data from previous surveys whose confidentiality period had already expired. Following the release of the report, Geophysical submitted copies of the GSI Works to the Administration without protest on four more occasions between March and November 1983.

In 1999, Appellee TGS-NOPEC Geophysical Co. (“TGS”), a Texas company that provides global geological data products and services, requested copies of the GSI Works from the Board (which had since replaced the Administration as the relevant Canadian regulatory body). The Board sent a copy to TGS in Texas. Fifteen years later, Geophysical sued TGS for copyright infringement, claiming direct infringement, contributory infringement, and unlawful removal of

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affect the analysis, we refer to both the Canadian corporation and its Delaware predecessor-in-interest as “Geophysical.”

copyright management information. The district court granted TGS's motion to dismiss in full, and Geophysical appealed. A different panel of this court affirmed the district court in part, but reversed and remanded Geophysical's direct infringement claim based on unlawful importation. *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 792, 796-98, 800 (5th Cir. 2017).<sup>2</sup>

On remand, TGS eventually moved for summary judgment. It argued that Geophysical had granted the Board an express, or alternatively implied, license to copy and distribute the GSI Works after the confidentiality period expired. The district court granted TGS summary judgment on the implied-license and express-license theories. Geophysical timely appealed.

## II. Discussion

Geophysical appeals both of the district court's holdings, and TGS argues the panel can alternatively affirm the district court under copyright law's first-sale doctrine. Because we agree with the district court that Geophysical granted the Board an implied license, we do not reach the express-license or first-sale arguments.

We review a grant of summary judgment de novo. *Mid-Continent Cas. Co. v. Petroleum Solutions, Inc.*, 917 F.3d 352, 357 n.7 (5th Cir. 2019). Because the

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<sup>2</sup> The court's opinion in this prior appeal discusses the factual and regulatory background in more detail.

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contention that a defendant possesses a license authorizing use of materials claimed to be copyrighted is an affirmative defense, TGS would bear the burden of proof at trial. *Lulirama Ltd., Inc. v. Axxcess Broad. Servs., Inc.*, 128 F.3d 872, 884 (5th Cir. 1997). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “If the moving party meets that burden, the non-moving party must show the existence of a genuine issue for trial, and the evidence and the inferences must be viewed in the light most favorable to the non-movant.” *HSBC Bank U.S.A., N.A. v. Crum*, 907 F.3d 199, 202 (5th Cir. 2018).

Geophysical alleges that, by importing copies of the GSI Works into the United States, TGS violated its exclusive right to “distribute copies” of the GSI Works. *See* 17 U.S.C. § 106(3). Even though the copies were made in Canada, the lawfulness of importing them into the United States is a question of U.S. law. *See* 17 U.S.C. § 602(a)(2) (“Importation into the United States . . . , without the authority of the owner of copyright under this title, of copies . . . , the making of which . . . would have constituted an infringement of copyright if this title had been applicable, is an infringement of the exclusive right to distribute copies . . . under section 106. . . .”). TGS does not dispute that Geophysical holds a valid copyright in the GSI Works. Thus, the relevant question for this Court is whether, under U.S. copyright law, Geophysical granted the Board a license to make and distribute copies of the GSI Works.

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