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Ninth Circuit: class representative may not tailor class definitions to accommodate personal and not class-wide merits issues

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Takeaway: The individual claims asserted by a class representative – as well as the defenses that apply to those claims – form the foundation of any effort to certify a class under Rule 23. If the claims of the class representative present significant individualized issues, the claims of the putative class members likely will face similar evidentiary hurdles. In a recent case filed by rock musician Greg Kihn, *Greg Kihn v. Bill Graham Archives, LLC*, No. 20-17397, 2022 WL 18935 (9th Cir. Jan. 3, 2022), the Ninth Circuit reversed the certification of damages and injunctive reliefs classes, ruling that the class representative could not define classes that accommodated his own individualized merits issues while at the same time sweeping class-wide merits issues under the rug.

From the 1970s through 2005, the syndicated radio show known as the "King Biscuit Flower Hour" broadcast live concert performances by rock musicians. The show used a mobile recording truck to record live performances at music venues such as the Winterland Ballroom in San Francisco and the Bottom Line in New York City. During the 1970s and 1980s, Greg Kihn and his band, the Greg Kihn Band – whose songs include early 80s hits "The Breakup Song" and "Jeopardy" – performed a number of shows at venues such as Winterland and the Bottom Line that appeared on King Biscuit.

Wolfgang's Vault, a website where users can pay to access live concert recordings from the 1950s through the 1990s, features thousands of audio and audiovisual recordings from well-known musicians such as the Greatful Dead, the Rolling Stones, and Janis Joplin. Because Wolfgang's Vault amassed its archive by acquiring (from among other sources) the King Biscuit Flower Hour collection, a number of Greg Kihn Band concerts are featured on the website. And Wolfgang's Vault apparently featured Greg Kihn recordings from sources other than King Biscuit.

In response to class certification, defendants showed that Greg Kihn executed a seven-year licensing agreement with the King Biscuit Flower Hour, authorizing the radio show to record his band's concerts at the time of performance and giving the show the right to commercially exploit the recordings. 2022 WL 18935, at *1. Nevertheless, Mr. Kihn and his publisher brought suit against the individuals who own and operate Wolfgang's Vault, asserting claims for copyright infringement under 17 U.S.C. § 101 and for "bootlegging" – the "unauthorized fixation of and trafficking in live musical performances" under 17 U.S.C. § 1101. *Id*. They brought the claims on behalf of themselves and other artists whose live performances are featured on the website. In support his claims, which did not initially acknowledge the existence of the King Biscuit licensing agreement, Mr. Kihn alleged that he never consented to King Biscuit's initial recordings or later distribution of those live performances. According to Mr. Kihn, at least 15 of his live performances could be accessed on Wolfgang's Vault.

In response to defendants' arguments in opposition to class certification, Mr. Kihn redefined his proposed putative classes so as to exclude the performances to which he consented, but without addressing the issues of consent that would apply to the putative class members. The district court accepted Mr. Kihn's revised class definitions, certifying Rule 23(b)(3) damages classes that the lower court said did not include the King Biscuit concerts. But on appeal, the Ninth Circuit reversed, ruling that issues of fact predominated: "Plaintiffs appear to have tailored the classes to the merits of Kihn's individual claims. Faced with evidence that some of Kihn's concerts were recorded with his consent, which would fatally undermine his claims for those concerts, Plaintiffs attempted to redefine the classes to exclude those concerts. But Plaintiffs may not accommodate differentiated evidence of their own consent while asking that every other artist's recordings be presumed unauthorized and included in the classes by default. If the case were litigated to judgment, individual issues of license and consent would predominate for the absent class members, who have not yet had the opportunity Plaintiffs had to sift through their claims and exclude those that lack merit." *Id*. at *2.

The panel also reversed the district court's certification of injunctive relief classes under Rule 23(b)(2). Given that individual issues predominated for purposes of the Rule 23(b)(3) classes, Plaintiffs did not show that they were seeking injunctive relief "benefitting all [class] members at once." *Id*. at *3 (quoting *Wal-Mart, Inc. v. Dukes*, 564 U.S. 338, 362 (2011)).