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U.S. DIST. COURT, WESTERN DIST. OF OKLA.
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**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

Capitol Records, Inc., et al.,)
Plaintiffs,)
vs.)
Debbie Foster and Amanda Foster,)
Defendants.)

Case No. Civ. 04-1569-W

ORDER

Before the Court is the defendant Deborah Foster’s application for an award of attorneys’ fees (docket no. 129). The matter has been fully briefed and is ready for determination.

Background

Prior to filing this action, the plaintiffs learned from documents obtained under subpoena from Cox Communications, Inc. that an Internet user named “fflygirl11” had downloaded several of their copyrighted works utilizing an account registered to the defendant Deborah Foster. The plaintiffs, through their “settlement support center,” contacted Ms. Foster regarding the alleged infringement. Although Ms. Foster never denied owning the account, she vehemently denied employing the Internet user name “fflygirl 11” or downloading the plaintiffs’ works. Ms. Foster did indicate that her estranged husband and her adult daughter, Amanda Foster, had access to her account and might possibly have been responsible for the alleged infringement. The plaintiffs represented to Ms. Foster that regardless whether she had directly participated in the downloading of their works, she would be liable as the owner of the Internet account used by “fflygirl 11.”

On November 18, 2004, the plaintiffs filed this action against Ms. Foster alleging that she had infringed their copyrights by unlawfully downloading musical works to which they owned the copyrights. After some initial discovery, the plaintiffs amended their complaint to name Amanda Foster as a co-defendant to the action. The First Amended Complaint, filed July 7, 2005, also added an allegation that “Plaintiffs are informed and believe that Defendants, without the permission or consent of Plaintiffs, have contributorily and/or vicariously infringed Plaintiffs’ Copyrighted

Recordings, including, but not limited to the extent that one or more members of their household engaged in copyright infringement.” Deborah Foster answered denying that she had infringed the plaintiffs’ copyrights and counterclaimed for “a declaratory judgment of non-infringement.”¹ Amanda Foster failed to answer and, on December 7, 2005, the Court granted the plaintiffs’ motion for a default judgment against her.

The plaintiffs continued to pursue their claims against Deborah Foster² and, after failed attempts to resolve the matter outside of court, the plaintiffs moved to dismiss their claims against Ms. Foster with prejudice. Ms. Foster, whose litigation investment was by that point considerable, refused to dismiss her counterclaim. On July 13, 2006, the Court, upon motion by the plaintiffs, ordered that the plaintiffs’ claims against Ms. Foster be dismissed with prejudice. In addition, it found that the dismissal of the plaintiffs’ claims against Ms. Foster effectively resolved the controversy in her favor and negated any justiciable case or controversy between the parties. The Court, therefore, ordered that Ms. Foster’s counterclaim for a declaratory judgment of non-infringement be dismissed. Finally, the Court determined that Ms. Foster was the prevailing party in the action and was thus eligible for an award of attorneys’ fees pursuant to the federal Copyright Act, 17 U.S.C. § 505. The question of Ms. Foster’s entitlement to such an award was reserved for adjudication upon Ms. Foster’s application for attorneys’ fees.

ANALYSIS

Under the Copyright Act, a prevailing party’s entitlement to an award of attorneys’ fees is a matter left to the Court’s discretion. Fogerty v. Fantasy, Inc., 510 U.S. 517, 533-34 (1994). However, prevailing plaintiffs and prevailing defendants must be treated alike. Id. While there is no “precise rule or formula” for the court to employ when determining a party’s entitlement to an award of attorneys’ fees, factors the court may consider include frivolousness, motivation, objective unreasonableness of the non-prevailing party’s case, and need in particular circumstances to advance

¹Deborah Foster also asserted a counterclaim for prima facie tort. That counterclaim was dismissed pursuant to the Court’s order entered October 5, 2005.

²The plaintiffs maintain that they were willing to dismiss their claims against Deborah Foster, but that she would not agree to resolve the matter unless she was reimbursed the amount she had incurred in attorneys’ fees.

considerations of compensation and deterrence. Palladium Music, Inc. v. Eatsleepmusic, Inc., 398 F.3d 1193 (10th Cir. 2005). These factors may be used “to guide courts’ discretion, so long as such factors are faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner.” Id. quoting Fogerty at 534 n. 19.

The plaintiffs argue that it would be inappropriate to grant Ms. Foster an award for attorneys’ fees in this case. First, they point to the fact that the Court previously determined that it was improper to condition dismissal of the plaintiffs’ claims against Ms. Foster on an award of attorneys’ fees under Rule 41(a)(2) of the Federal Rules of Civil Procedure. In its July 13, 2006 order, the Court noted that when a plaintiff dismisses an action with prejudice, attorneys’ fees are usually not a proper condition of dismissal because the defendant cannot be made to defend again. See Aero Tech, Inc. v. Estes, 110 F.3d 1523, 1528 (10th Cir. 1997). It is only in exceptional circumstances that a court may condition a dismissal with prejudice upon the plaintiffs’ payment of the defendant’s attorneys’ fees. Id. Exceptional circumstances include such situations as where a plaintiff makes a practice of repeatedly bringing claims and then dismissing with prejudice “after inflicting substantial litigation costs on the opposing party and the judicial system.” Id.

The Court concluded there was no evidence that the plaintiffs engaged in any practice that would constitute exceptional circumstances justifying an award of attorneys’ fees under the provisions of Rule 41(a)(2). The plaintiffs contend that this finding is dispositive of the issue of Ms. Foster’s entitlement to attorneys’ fees under the Copyright Act. It is not. While awards for attorneys’ fees are not granted to the prevailing party automatically under the Copyright Act, neither are they confined to “exceptional circumstances.” Rather they are to be granted when equity and the ends of the Copyright Act are advanced. In fact, district courts within this circuit have observed that “though said to be a matter within the court’s discretion, attorney’s fees are awarded more often as the rule than the exception.” Walden Music, Inc. v. C.H.W., Inc., 1996 WL 254654 (D.Kan.) at *6, quoting Big Tree Enterprises, Ltd. v. Mabrey, 1994 WL 191996 (D.Kan), aff’d 45 F.3d 439 (10th Cir. 1994); see also Frank Music Corp. v. Sugg, 393 F.Supp.2d 1145,1147 (W.D. Okla. 2005). Furthermore, although there is some overlap in the factors considered in their application – notably,

in both instances the court is to consider whether the claims at issue were “frivolous” – the underlying aims of Rule 41 (a)(2) and the Copyright Act are dissimilar. Rule 41 (a)(2) aims primarily to thwart a claimant’s abuse of his opponent and the judicial process. Copyright law “ultimately serves the purpose of enriching the general public through access to creative works.” Fogerty at 527. Because that end is served by delineating the boundaries of copyright law as clearly as possible, both plaintiffs and defendants should be encouraged to litigate their meritorious claims and defenses. Id.

Because the Court’s denial of Ms. Foster’s request for attorneys’ fees pursuant to Rule 41 (a)(2) does not resolve the question of her entitlement to fees under the Copyright Act, the Court will next consider whether the plaintiffs claims were frivolousness, improperly motivated, or objectively unreasonable as outlined in Fogerty.

The plaintiffs’ claims against Ms. Foster were for direct, as well as contributory or vicarious copyright infringement. The plaintiffs appear to base their secondary liability claims against Ms. Foster solely on the fact that she maintained an Internet account which a member of her household utilized to infringe the plaintiffs’ copyrights. The Copyright Act does not expressly render anyone liable for infringement committed by another. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, (2005). Rather, the doctrine of secondary liability emerged from common law principles. Id. Under those common law principles, one infringes a copyright contributorily by intentionally inducing or encouraging a direct infringement. The elements of a claim for contributory copyright infringement are: (1) direct infringement by third party; (2) knowledge by the defendant that third parties were directly infringing; and (3) substantial participation by the defendant in infringing activities. See Newborn v. Yahoo!, 391 F.Supp.2d 181, 186 (D.D.C. 2005); see also Newborn v. Yahoo! Inc., 437 F.Supp.2d 1 (D.D.C. 2006) (finding defendant was entitled to an award of attorneys’ fees after prevailing upon plaintiff’s frivolous and objectively unreasonable contributory copyright claim). Merely supplying means to accomplish infringing activity cannot give rise to imposition of liability for contributory copyright infringement. Id.; see also A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001). One infringes a copyright vicariously by

profiting from direct infringement while declining to exercise a right to stop or limit it. Grokster, 545 U.S. 913.

The plaintiffs failed to allege any facts in their complaint that would support Ms. Foster's secondary copyright infringement liability. The complaint is devoid of any suggestion that Ms. Foster knew third parties were using her account to infringe the plaintiffs' copyrights or that she substantially participated in any infringing activities. Also absent from the complaint is any allegation that Ms. Foster profited from a direct infringement. Additionally, neither the parties' submissions nor the Court's own research has revealed any case holding the mere owner of an Internet account contributorily or vicariously liable for the infringing activities of third persons. The single case this Court has found which even alludes to the merits of a claim made by recording industry plaintiffs against a parent for the alleged infringing activities of her children is Elektra Entertainment Group, Inc. v. Santangelo, 2005 WL 3199841, *3 (S.D.N.Y.). In Santangelo, the court denied the defendant's motion to dismiss the plaintiffs' direct infringement claim against her, but expressed skepticism that "an Internet-illiterate parent, who does not know Kazaa from a kazoo" could be held liable for copyright infringement committed by a child who downloads music over the Web without the parent's knowledge or permission but using the parent's Internet account. While the Court is not prepared to pronounce the plaintiffs' secondary copyright infringement claims to be frivolous or objectively unreasonable, they would certainly appear to be untested and marginal.

In addition to the weakness of the secondary copyright infringement liability claims against Ms. Foster, there is a question of the plaintiffs' motivations in pursuing them. The plaintiffs had every right to attempt to reach a settlement of their claims with a suspected infringer but there is an appearance that the plaintiffs initiated the secondary infringement claims to press Ms. Foster into settlement after they had ceased to believe she was a direct or "primary" infringer.

The plaintiffs maintain that their litigation approach has been sanctioned by numerous courts which have refused to grant attorneys' fees awards to defendants who achieved favorable results in their copyright litigation. The Court will examine each of the unpublished opinions proffered by the plaintiffs.

Capitol Records, Inc., et al. v. O'Leary, 2006 U.S. Dist. LEXIS 5115 (C.D. Cal. Jan. 31, 2006) (attached as Exhibit G to the plaintiffs' response in opposition to the defendant's application for attorneys' fees), addresses a request for attorneys' fees not under the Copyright Act, but under Rule 41(a)(2) of the Federal Rules of Civil Procedure. It is inapposite for reasons discussed above.

In Priority Records L.L.C., et al. v. Chan, No. 2:04-CV-73645-LPZ-RSW (E.D. Mich. May 19, 2005) (attached to the plaintiffs' response in opposition as Exhibit H), upon dismissal of the plaintiffs' claims with prejudice, the court declined to find that the defendant was the prevailing party. It conjectured, however, that even were the defendant determined to be the prevailing party, she would not be entitled to an award of attorneys' fees under the Copyright Act. The Court does not find Priority to be particularly applicable to this case. There are simply too many substantial dissimilarities between Priority and the case at hand for it to be persuasive. For instance, as soon as the plaintiffs in Priority concluded that it was the defendant's children who likely infringed their copyrights, they moved to amend their complaint to name the children and to dismiss the defendant. It appears that prior to the dismissal, the defendant had filed no counterclaims and no dispositive motions. The decisive dissimilarity, however, is the fact that in Priority, the defendant had only to defend against a well-established direct infringement claim. There was no claim against her for contributory or vicarious infringement.

Similarly, in Virgin Records America, Inc., et al. v. Darwin, No. SA CV 04-1346 AHS (ANx) (C.D. Cal. Apr. 17, 2006) (attached to the plaintiffs' response in opposition as Exhibit I), after learning that it was the defendant's former roommate who was the direct infringer of the plaintiffs' copyrights, the plaintiffs moved to dismiss the defendant without prejudice. After entering a dismissal with prejudice, the court concluded that the defendant was the prevailing party, but denied his application for attorneys' fees after finding that such an award was not supported by the Fogerty factors. The court found it was not frivolous or unreasonable for the plaintiffs to pursue a direct infringement claim against the individual with an apparent connection to the I.P. address associated with unlawful downloads of the plaintiffs' copyrighted works.

Like Priority, Darwin involves only a direct infringement claim. Once the plaintiffs in Darwin determined that the defendant's former roommate was the direct infringer of their copyrights, they sought to dismiss the defendant. They did not elect instead to pursue secondary liability claims against the defendant. It is this Court's opinion that such claims veer much closer toward the boundaries of the frivolous and unreasonable than does a direct infringement claim.

Finally, Elektra Entertainment Group, Inc. v. Perez, Civ. No. 05-931 AA (D. Or. Oct 25, 2006) (attached to the plaintiffs' supplemental authority to their response in opposition), involves a dismissal without prejudice. The Court is unable to accept the plaintiffs' contention that the distinction between a dismissal without prejudice and a dismissal with prejudice is one "without a difference." The dismissal of the plaintiffs' claims against Ms. Foster with prejudice served as the basis for the Court's finding that she was the prevailing party in this litigation and was thus eligible for an award of attorneys' fees. Neither can the Court agree with the plaintiffs that the facts in Perez are "virtually identical" to the facts in this case. Like the other cases cited by the plaintiffs, Perez entails only direct infringement claims. It does not involve a claim of contributory or vicarious liability against the dismissed defendant. In fact, in direct contrast to this case, upon becoming convinced that it was other members of the defendant's family who were responsible for infringing their copyrights, the Perez plaintiffs dismissed the defendant and proceeded against those family members.

Unlike the courts in the unpublished opinions cited by the plaintiffs, this Court must consider whether a defendant should receive an award of attorneys' fees when she successfully defends against the novel application of secondary copyright infringement claims. The United States Supreme Court has recognized that "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." Furthermore, when the prevailing party is the defendant, "who by definition receives not a small award but no award," awarding fees becomes particularly important. See Woodhaven Homes & Realty, Inc. v. Hotz, 396

F.3d 822, 824 (7th Cir. 2005), quoting Assessment Technologies of WI, LLC v. WIREdata, Inc., 361 F.3d 434, 436-37 (7th Cir. 2004). “[W]ithout the prospect of such an award, the party might be forced into a nuisance settlement or deterred all together from exercising his rights.” Id. The Court finds that this case presents a situation where considerations of compensation under Fogerty weigh in favor of the Court’s award of attorneys’ fees to Ms. Foster. Her only alternative to litigating the plaintiffs’ contributory or vicarious liability claim was to capitulate to a settlement for a violation she insists she did not commit. Such capitulation would not advance the aims of the Copyright Act as the plaintiffs’ untested theory would remain untested. The Court concludes that under the facts of this case, the prevailing defendant is entitled to an award representing her reasonable attorneys’ fees and costs pursuant to § 505 of the Copyright Act.

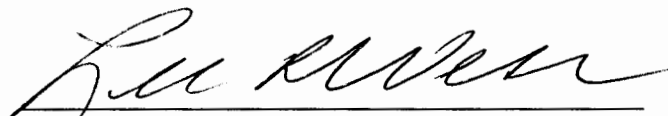
Ms. Foster has submitted copies of her counsel’s billings and affidavits as to their reasonableness. The plaintiffs have not addressed the reasonableness of the amount of fees requested by the defendant but have instead requested that the Court grant them time for discovery into the matter should the Court find Ms. Foster to be entitled to a fee award. The Court will, therefore, take up the matter of the appropriate fee award after discovery on the issue has been completed and the matter has been briefed by the parties.

Accordingly the Court:

1. GRANTS in part the defendant Deborah Foster’s application for attorneys’ fees, finding she is entitled to an award of her reasonable attorneys’ fees in this action under § 505 of the Copyright Act;
2. DENIES the defendant Deborah Foster’s application for attorneys’ fees under 28 U.S.C. § 1927;
3. ORDERS the plaintiffs to inform the Court on or before February 13, 2006, of the amount of time they require for discovery into the issue of the reasonableness of the defendant’s fee request;
4. DENIES the defendant Deborah Foster’s motion for leave to file amici brief (docket no. 132); and

5. DENIES the defendant Deborah Foster's motion for scheduling order (docket no. 131). Once the Court has set a date for completion of discovery into the matter of the reasonableness of the defendant's fee request, it will establish firm dates for the defendant to supplement her application for attorneys' fees, for the plaintiffs to respond to that supplemented application, and for the defendant to reply.

ENTERED this 6th day of February, 2007.



LEE R. WEST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Capitol Records, Inc., et al.,)
Plaintiffs,)
vs.) Case No. Civ. 04-1569-W
)
Debbie Foster and Amanda Foster,)
Defendants.)

ORDER

This matter comes before the Court on the Plaintiffs' Motion for Reconsideration of This Court's February 6, 2007 Order (docket no. 166). The matter has been fully briefed and the Court makes its determination as follows.

A motion for reconsideration is not among the motions recognized by the Federal Rules of Civil Procedure and is of very limited appropriateness. The Plaintiffs assert that their motion for reconsideration may be determined under either Rule 59 or Rule 60 of the Federal Rules, but decline to advise the Court which Rule they seek to invoke. In any case, neither rule is applicable because the February 6 order is not an appealable final judgment. American Soda, LLP v. Filter Wastewater Group, Inc., 428 F.3d 921, 924 (10th Cir. 2005) (award of attorneys' fees was not final until the court's entry of judgment reduced the award to a sum certain). The plaintiffs' motion shall, therefore, be treated as one directed to the Court's inherent power to modify orders pending final judgment.

A motion for reconsideration is appropriate in instances where the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties. Such a motion is also appropriate where the Court has made an error not of reasoning, but of apprehension. Finally, a motion for reconsideration would be proper where a controlling or

significant change in the law has occurred since the parties' submission of an issue to the Court. None of those situations is present here.

1. **The Court's February 6 order is entirely consistent with Fogerty v. Fantasy, Inc.**

The plaintiffs challenge the Court's determination that the defendant is entitled to an award of attorneys' fees on the ground that such an award was not dictated by the factors set forth in Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). The plaintiffs do not suggest that the Court failed to consider Fogerty. Rather, they argue that it did not properly apply Fogerty to their case. Setting aside the fact that the plaintiffs' argument falls outside the proper parameters of a motion for reconsideration, the Court notes that the plaintiffs strive to imbue the "Fogerty factors" with a talismanic import the U.S. Supreme Court clearly did not intend. In Fogerty, the Supreme Court affirmed that under the Copyright Act, a prevailing party's entitlement to an award of attorney's fees is a matter left to the trial court's discretion. It acknowledged what have become known as the "Fogerty factors" simply as a guide to trial courts evaluating whether a prevailing party should be awarded fees under the peculiar facts of a given case. The Supreme Court stated, "[t]here is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" Fogerty at 535, quoting Hensley v. Eckerhart, 461 U.S. 424, 436-437 (1983). The Court then set forth, in a footnote, the following:

Some courts following the evenhanded standard have suggested several nonexclusive factors to guide courts' discretion. For example, the Third Circuit has listed several nonexclusive factors that courts should consider in making awards of attorney's fees to any prevailing party. These factors include '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.' Lieb v. Topstone Industries, Inc., 788 F.2d 151, 156 (1986).

We agree that such factors *may be used* to guide courts' discretion so long as such factors are faithful to the purposes of the Copyright Act *and are applied to prevailing plaintiff and defendants in an evenhanded manner.*

Fogerty at 535, fn. 19 (emphasis added.).

A fair reading of Fogerty makes abundantly clear the fact that the so called "Fogerty factors" are neither exclusive nor determinative.¹ Nonetheless, in its February 6 order, this Court explicitly considered each of them. While the Court stopped short of finding the plaintiffs' secondary copyright infringement claims frivolous or objectively unreasonable, it did find that such claims were "untested and marginal." While the Court did not find the plaintiffs' motives were necessarily improper, it did find those motives to be questionable in light of the facts of the case. Finally, contrary to the plaintiffs' assertion, the Court did conclude that the Fogerty factor regarding the need for compensating the prevailing party under the particular circumstances of the case was, in fact, met. The Court noted that where, as here, the prevailing party is the defendant who, by definition, receives no award for damages at the successful conclusion of a meritorious defense, considerations of compensation become particularly important. See also Woodhaven Homes & Realty, Inc. v. Hotz, 396 F.3d 822, 824 (7th Cir. 2005) (without the prospect of an award of attorneys' fees, a defendant might be forced into a nuisance settlement or deterred altogether from exercising his rights).

¹The plaintiffs stress that they "**they are not aware of a single reported decision where a Court has found none of the Fogerty factors but still awarded fees**" See Plaintiffs' Reply in Further Support of Their Motion for Reconsideration of this Court's February 6, 2007 Order at p. 3, (emphasis in original). The Court has made no effort to canvass all such cases. Its cursory research has, however, uncovered a number of *unpublished* cases where courts granted record company plaintiffs, including several of the plaintiffs herein, awards of attorneys' fees without so much as a passing mention of Fogerty or its factors. See e.g., Capitol Records, Inc. v. Lyons, 2004 WL 1732324 (N.D. Tex.); Elektra Entertainment Group, Inc. v. Bryant, 2004 WL 783123 (C.D. Cal.); UMG Recodings, Inc. v. Davito, 2005 WL 3776349 (N.D. Ind.).

The plaintiffs appear to suggest that they may disregard the Court's finding addressing the fourth Fogerty factor because the Court failed to invoke their preferred incantation. The Court stated, "this case presents a situation where considerations of compensation under Fogerty weigh in favor of the Court's award of attorneys' fees to Ms. Foster." The plaintiffs insist that to be effective, the Court was required to state its finding in terms of "the need for" compensation. The Court is satisfied that its finding is sufficient to justify its award of attorneys' fees to the defendant.

Although this Court did conscientiously apply the Fogerty factors, it did not limit its considerations thereto. Rather, it heeded the Supreme Court's admonition that such factors are, and must at all times remain, subservient to the purposes of the Copyright Act. With regard to those purposes, the Fogerty Court observed,

[b]ecause copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. Thus, a defendant seeking to advance meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious infringement claims.

Id. at 519.

Having found that the plaintiffs' secondary copyright infringement claims were untested, this Court concluded that the purposes of the Copyright Act would be well served by the encouragement of litigation of those claims. The defendant did litigate the claims and prevailed, albeit through the plaintiffs' voluntary dismissal.

The Court cannot embrace the plaintiffs' contention that its reading of Fogerty renders the decision "superfluous." Fogerty's real importance is entirely independent of the factors set forth as dicta in a footnote. The decision strikes down the "dual standard in which courts generally awarded attorneys' fees to prevailing plaintiffs as a matter of course while denying fees to prevailing

defendants absent a showing that the plaintiff's lawsuit was frivolous or brought in bad faith." In so doing, the Supreme Court recognized the "important role played by copyright defendants." Fogerty at 532, fn. 18. This Court is confident that its February 6 order is true to Fogerty's dictate that prevailing plaintiffs and defendants be treated alike.

2. The Court did not assume there was no basis for the plaintiffs' secondary copyright infringement claims.

Contrary to the plaintiffs' contention, this Court did not assume there was no basis for the plaintiffs' secondary copyright infringement claims, nor did it find that the plaintiffs were required to show that the defendant had actual knowledge of the underlying infringement. The Court certainly did not make a finding that contributory and vicarious claims cannot be viable in cases where copyrighted works have been downloaded or shared utilizing file-sharing software and an Internet account. The Court reviewed the limited record developed in this particular case and concluded that it offered scant support for secondary copyright claims. The plaintiffs' complaint, which pursuant to Rule 8 of the Federal Rules of Civil Procedure must "set forth a short and plain statement of the claims showing that the pleader is entitled to relief," stated merely that:

Plaintiffs are informed and believe that Defendants, without the permission or consent of Plaintiffs, have contributorily and/or vicariously infringed Plaintiffs' Copyrighted Recordings, *including, but not limited to the extent that one or more members of their household engaged in copyright infringement.* Defendants' acts constitute infringement of the Plaintiffs copyrights and exclusive rights under copyright law.

First Amended Complaint, ¶ 16, (emphasis added).

The sum of the allegations set forth in the plaintiffs' claim for secondary copyright infringement against the defendant was that members of the defendant's household engaged in copyright infringement. Based on the limited record and the fact that the plaintiffs could not point to a single case finding secondary liability for copyright infringement under similar circumstances,

the Court concluded the plaintiffs' secondary copyright claims appeared to be marginal and were indisputably untested.² It therefore concluded that the purposes of the Copyright Act were advanced by the defendant's litigation of such claims.

The plaintiffs assert that had the case continued, they would have proved their secondary liability claims. Specifically, they contend they would have been able to show that the defendant knew or "should have known" that her Internet account was being used by a member of her household to infringe the plaintiffs' copyrights. That may be so. The plaintiffs, however, chose not to pursue the claim. The Court finds disingenuous the plaintiffs' assertion that "had they been given an opportunity, they would have been able to prove vicarious infringement." The plaintiffs were in no way deprived of an opportunity to prove their allegations. They moved, voluntarily, to dismiss their claims after the defendant had already made a substantial investment toward defending against those claims.

3. The plaintiffs did not offer to dismiss their claims against the defendant until after she had already undertaken the litigation of those claims and incurred substantial expenses therefor.

The plaintiffs take issue with the Court's observation that the defendant's only alternative to litigating the plaintiffs' secondary copyright infringement claims was to capitulate to a settlement for a violation she insists she did not commit. Nothing in the plaintiffs' recounting of the parties' settlement negotiations, whether prior to the filing of the plaintiffs' suit or afterward, suggests the Court's observation was inaccurate. The plaintiffs contend that beginning on April 21, 2005, they

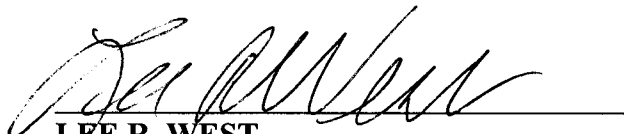
² While it appears that the Court's formulation of the elements of contributory and vicarious copyright infringement claims is consistent with the Supreme Court's pronouncements in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), adoption of the plaintiffs' formulation would not alter the Court's determination with regard to the defendant's entitlement to attorneys' fees.

gave the defendant “repeated opportunities to end this litigation without paying anything.” Of course, that is not true. By the time the plaintiffs offered to dismiss their claims against the defendant, she had made a considerable litigation investment, and would have been required to pay those expenses already incurred. Furthermore, the plaintiffs offered merely to dismiss their claims without prejudice, thus leaving the defendant exposed to continued litigation in the matter.

The plaintiffs also persist in conflating the defendant’s daughter’s infringement with liability on the part of the defendant. While the plaintiffs obtained a default judgment against the daughter, there has never been any finding of liability on the part of the defendant. On the contrary, she prevailed against the plaintiffs’ claims.

For the foregoing reasons, the plaintiffs’ motion for reconsideration of this Court’s February 6, 2007 order is DENIED.

ENTERED this 23rd day of April 2007.



LEE R. WEST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED

JUL 16 2007

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY RS DEPUTY

Capitol Records, Inc., et al.,)
Plaintiffs,)
vs.)
Debbie Foster and Amanda Foster,)
Defendants.)

Case No. Civ. 04-1569-W

ORDER

Before the Court is the defendant Deborah Foster's application for an award of attorneys' fees (docket no. 129) as well as her supplement to that application (docket no. 224). The matter has been fully briefed and the parties presented their evidence at the hearing conducted on July 5, 2007.

Background

On November 18, 2004, the plaintiffs filed this action against Ms. Foster alleging that she had infringed their copyrights by unlawfully downloading musical works to which they owned the copyrights. After retaining counsel, the defendant amended her answer and asserted counterclaims for declaratory judgment and prima facie tort. After some initial discovery, the plaintiffs amended their complaint to name Ms. Foster's adult daughter, Amanda Foster, as a co-defendant to the action. The first amended complaint, filed July 7, 2005, also added an allegation that "Plaintiffs are informed and believe that Defendants, without the permission or consent of Plaintiffs, have contributorily and/or vicariously infringed Plaintiffs' Copyrighted Recordings, including, but not limited to the extent that one or more members of their household engaged in copyright infringement." Deborah Foster's answer to the amended complaint reasserted the declaratory judgment and prima facie tort counterclaims. Upon motion by the plaintiffs, the Court dismissed the prima facie tort

counterclaim on the ground that Oklahoma recognizes no such cause of action. Amanda Foster failed to answer the amended complaint and the Court granted the plaintiffs' motion for a default judgment against her. The plaintiffs continued to pursue their claims against Deborah Foster¹ and, after failed attempts to resolve the matter outside of court, the plaintiffs moved to dismiss their claims against Ms. Foster with prejudice. Ms. Foster, whose litigation investment was by that point considerable, refused to dismiss her counterclaim. On July 13, 2006, the Court, upon motion by the plaintiffs, ordered that the plaintiffs' claims against Ms. Foster be dismissed with prejudice. In addition, it found that the dismissal of the plaintiffs' claims against Ms. Foster effectively resolved the controversy in her favor and negated any justiciable case or controversy between the parties. The Court, therefore, ordered that Ms. Foster's counterclaim for a declaratory judgment of non-infringement be dismissed. Finally, the Court determined that Ms. Foster was the prevailing party in the action and was thus eligible for an award of attorneys' fees pursuant to the federal Copyright Act, 17 U.S.C. § 505. The question of Ms. Foster's entitlement to such an award was reserved for adjudication upon Ms. Foster's application for attorneys' fees.

On August 7, 2006, Ms. Foster submitted her application for attorneys' fees and on February 6, 2007, the Court determined that she was entitled to an award under § 505 of the Copyright Act. Ordinarily, the Court would have entered an award for fees in conjunction with its determination of the defendant's application. However, rather than address the reasonableness of the fee requested by the defendant, the plaintiffs instead asked to be granted time to conduct discovery on the issue and the question of entitlement was, in effect, bifurcated from the question of the size of the fee award. It is that latter question to which the Court now turns.

¹The plaintiffs maintain that they were willing to dismiss their claims against Deborah Foster, but that she would not agree to resolve the matter unless she was reimbursed the amount she had incurred in attorneys' fees.

ANALYSIS

The defendant seeks attorneys' fees in the amount of \$105,680.75 based on a lodestar calculation. She also seeks costs and expenses in the amount of \$4,013.68 and expert witness fees, costs, and expenses in the amount of \$4,668.75. Her combined total request is for \$114,363.18. The plaintiffs object to the requested fee as unreasonable. They dispute hourly rate upon which the defendant's lodestar calculation is based. They also contend that the hours billed by the defendant's counsel include work that is not properly compensable, time that is improperly block billed, and work that is excessive, unreasonable, and duplicative. The plaintiffs also maintain that the defendant may only recover expert witness fees in the amount of \$40 per day pursuant to 28 U.S.C. § 1821. They further argue that the defendant is not entitled to fees for work that could have been avoided had she assisted the plaintiffs or acceded to settlement. Finally, they contend the case was of too simple and mundane a nature to warrant a fee in excess of \$100,000.

1. The reasonable hourly rate for the defendant's counsel is \$175 per hour.

Section 505 of the Copyright Act provides in pertinent part that "in any copyright infringement action, the court may ... award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. This Court has already ruled that Ms. Foster is a prevailing party entitled to recover an award for attorneys' fees pursuant to § 505. Therefore, the only question remaining is whether the amount of fees requested by Ms. Foster is "reasonable." To determine the reasonableness of a fee request, the Court begins calculating the so-called "lodestar." See Case v. Unified School District No. 233, Johnson County, Kan. 157 F.3d 1243, 1249 (10th Cir. 1998).

To arrive at the lodestar, the Court multiplies the hours the defendant's counsel reasonably spent on the litigation by a reasonable hourly rate. Id. "The first step is setting a rate of compensation for the hours reasonably expended is to determine what lawyers of

comparable skill and experience practicing in the area in which the litigation occurs would charge for their time.” *Id.* at 1256 (quoting Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983)). Ms. Foster has calculated her lodestar amount based upon an hourly rate of \$225 for Oklahoma City lawyer Marilyn Barringer-Thomson, \$175 for Oklahoma City lawyer Warren Henson, and \$80 for Ms. Barringer-Thomson’s paralegal. She submits these are reasonable hourly rates for the work performed. Both Marilyn Barringer-Thomson and Warren Henson state in their declarations that \$175 per hour is within the range of typical compensation for lawyers of comparable experience and expertise. The plaintiffs likewise offer evidence to show that hourly rates between \$175 and \$225 are reasonable for experienced lawyers in this locality performing the type of work this litigation entailed. They contend, however, that \$175 is the appropriate hourly rate because it is not only reasonable but is also the rate stipulated in the defendant’s fee agreement with her counsel.

An attorneys’ fee agreement is not necessarily determinative of the hourly rate to which a party is entitled in a fee award under the Copyright Act. *See Cooper v. Singer*, 719 F.2d 1496, 1503 (10th Cir. 1983)(finding that attorneys’ fees were not limited by fee agreement under the Civil Rights Act), overruled on other grounds by Venegas v. Mitchell, 495 U.S. 82 (1990); Crescent Publishing Group, Inc. v. Playboy Enterprises, Inc., 246 F.3d 142, 150-151 (2nd Cir. 2001) (finding no per se rule under § 505 limiting attorneys’ fees to the amount set forth in a fee agreement). In the instant case, however, the defendant has failed to establish that she should be compensated in excess of the agreement. *See Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1201 (10th Cir. 1986) (an applicant bears the burden of establishing the reasonableness of her fee request). Ms. Foster has offered no evidence that Ms. Barringer-Thomson possesses any special skills or expertise in copyright litigation that would justify an hourly rate at the high end of the reasonable scale. In fact, the evidence shows that Ms. Barringer-Thomson has had limited experience in copyright law. The Court, therefore,

accepts \$175 per hour as the appropriate hourly rate for both Ms. Barringer-Thomson and Mr. Henson for purposes of calculating a lodestar amount.

2. A total of 339.02 attorney hours and 28.1 paralegal hours were reasonably and necessarily expended in litigating the defendant's case.

Ms. Foster has submitted billings for 466.15 hours of attorney time and 34.9 hours of paralegal time. The Court must now examine these billed hours in order to determine whether that number is both reasonable and warranted in light of the circumstances of the case. See Ramos v. Lamm, 713 F.2d at 554. It is the burden of any applicant for attorneys' fees to "prove and establish the reasonableness of each dollar, each hour, above zero." Mares, 810 F.2d at 1201. To meet that burden, lawyers are required to keep meticulous time records that "reveal ... all hours for which compensation is requested and how those hours were allotted to specific tasks." Ramos, 713 F.2d at 713.

When reviewing an application for attorneys' fees, the Court should approach its reasonableness inquiry "much as a senior partner in a private law firm would review the reports of subordinate attorneys when billing clients ..." Ramos, 713 F.2d at 555. The Court must consider the number of hours a reasonable attorney would have billed in the marketplace under similar circumstances. "In other words the object is to simulate the market where a direct market determination is infeasible." Robinson v. City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998) (quoting Steinlauf v. Continental Illinois Corp., 962 F.2d 566, 572 (7th Cir. 1992)). The Court has scrutinized the defendant's billing records and the parties submissions regarding the reasonableness of the work reflected therein. The Court has paid particular attention to the expert reports and the testimony offered at hearing by the parties' respective expert witnesses. On behalf of the plaintiffs, D. Kent Meyers, a senior partner at the Oklahoma City law firm of Crowe and Dunlevy, prepared an extremely detailed analysis of the defendant's billings pointing to numerous items he believed were non-compensable or

excessive. Based on his extensive experience and his review of the record and the defendant's billings, he concluded that the total hours spent by the defendant's counsel was excessive and unreasonable in light of the relative simplicity of a case consisting primarily of the plaintiffs' allegations that Ms. Foster had infringed the plaintiffs' copyrights and Ms. Foster's defense that "she didn't do it." He opined that the defendant's counsel engaged in block billing which rendered impossible an accurate assessment of the time billed. Finally, he described the process he employs when reviewing his own firm's billings to be submitted in conjunction with fee applications. He suggested that his practice is to reduce the hours billed by approximately 40 percent. He concluded that a 40-percent reduction in many of the time entries submitted by the defendant would bring the defendant's fee application into line with fees charged for similar work in the community. He also offered a detailed breakdown of those charges he found to be non-compensable, improperly billed, or excessive.

Ms. Foster offered the testimony of Richard B. Wilkinson in support of the reasonableness of her fee application. Mr. Wilkinson, General Counsel for the Oklahoma Education Association, submitted a much less detailed analysis of the defendant's billing records. He found the fee application to be reasonable absent any deductions whatsoever based upon his rather cursory review of the record, the defendant's submitted billings, and his general familiarity with Ms. Barringer-Thomson's work. While the Court does not doubt the sincerity of Mr. Wilkinson's opinions, it is clear that his method of analysis did not allow for the level of scrutiny the Court finds proper when determining the fee that may reasonably be shifted to a non-prevailing party under a statute such as § 505 of the Copyright Act.

The Court finds compelling Mr. Meyers' report and testimony demonstrating that the a substantial reduction of the defendant's billed hours is necessary to bring the fee application into line with norms of the local marketplace. Whereas Mr. Meyers testified that a 40-percent reduction in billings submitted for fee application is his custom, the defendant's counsel have

made only token reductions in their billings. The Court has found less than twenty instances in the defendant's billing records where time has been reduced. Most of those instances are for phone calls resulting only in voice messages or for the reading of emails. It appears in total, the defendant's counsel considered less than a dozen hours to be non-chargeable. After careful review, the Court finds considerable deductions are necessary to exclude excessive and unnecessary time billed by the defendant's counsel.

At the outset, the Court agrees with the plaintiffs that certain items of time are not compensable. The time spent by both Ms. Barringer-Thomson and Mr. Henson attending the scheduling conference held March 1, 2006 and the settlement conference held January 10, 2006 is duplicative and must be reduced. The Court therefore deducts the duplicated 4.5 hours from the total. See Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717 (5th Cir. 1974), see also Ramos, 713 F.2d at 554. Additionally, the Court finds that certain unsuccessful work is not compensable. The Court does not accept the plaintiffs' contention that all unsuccessful motions and objections should be considered non-compensable. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." Hensley v. Eckerhart, 461 U.S. 424, 440 (1983). Claims are related if they are based upon "a common core of facts." Id. at 435. A number of Ms. Foster's unsuccessful motions and objections were clearly based on the common core of facts relating to the plaintiffs' copyright claims and her defense of non-infringement. However, Ms. Foster's prima facie tort counterclaims arose not out of the facts surrounding the alleged unlawful downloading of the plaintiffs' copyrighted recordings, but rather out of the method utilized by the plaintiffs in prosecuting their case against her. The distinct factual underpinnings of the prima facie tort counterclaims combined with the claims' utter lack of legal merit dictate that time spent those claims are non-compensable and must be deducted. Similarly, time spent on the defendant's

improperly-filed summary judgment motion must be deducted. Finally, the Court finds that time spent on spurious objections to the plaintiffs' counsel's motions to withdraw is non-compensable and must be deducted.

The Court's ability to make an accurate deduction for the non-compensable matters identified above is complicated by counsel's tendency to block bill time spent on these efforts with time spent on compensable pursuits. The Court finds evidence of non-compensable work relating to the prima facie counterclaims, the improperly-filed motion for summary judgment, and the unreasonable objections to withdrawal by counsel included in billings dated 2/23/05, 4/04/05, 5/15/05, 5/16/05, 7/27/05, 9/02/05, 9/06/05, and 4/05/06. A deduction of 18.81 hours billed by Ms. Barringer-Thomson on the dates set forth above appropriately accounts for the aforementioned non-compensable matters.

The Court finds that time spent in an unsuccessful effort to have an amicus brief filed in the case was unnecessary and non-compensable and deducts the 9.7 hours billed on that item by Ms. Barringer-Thomson on 8/03/06, 8/29/06, and 8/31/06. The Court also deducts 2.5 hours billed by Ms. Barringer-Thomson on 11/30/05 for downloading the plaintiffs' default judgment against Amanda Foster, 2.7 hours billed on 4/03/07 by Warren Henson for delivering and mailing documents, and 1.5 hours billed on 3/05/05 by Ms. Barringer-Thomson's paralegal for faxing documents to the plaintiffs' counsel. These are not items that require legal skills and training and should not be billed as attorney or paralegal time.

After specifically deducting those hours spent on work which is, on its face, non-compensable, the Court finds additional reductions are in order. Based upon the parties' submissions and the Court's own knowledge of the case, it is clear that the defendant has failed to appropriately exclude excessive and unnecessary time as required. The docket in this case is replete with the defendant's supplemental and corrective filings designed to cure defects in motions and responses that should have been complete and correct when originally

filed. The costs of such inefficiency should not be shifted to the plaintiffs. Furthermore, approximately half the fee claimed by the defendant is attributable to hours billed after the plaintiffs' claims against her were dismissed with prejudice, after she was declared the prevailing party in the action, and after the defendant had already submitted her initial application for attorneys' fees to the Court.

In order to exclude from the lodestar calculation those hours the Court has determined to be unnecessary and excessive, the following additional reductions must be made. The Court finds that Ms. Barringer-Thomson's hours should be reduced by 2.0 hours on 2/23/05, by 2.0 hours on 4/22/05, by 1.0 hour on 5/26/06, by 1.0 hour on 8/14/06, by 1.0 hour on 8/15/06, by 1.5 hours on 9/06/05, and by 2.0 hours on 10/12/06. Ms. Barringer-Thomson's paralegal's billings should be reduced by 1.0 hour on 5/13/05. Subtracting these deductions from the total number of hours billed by the defendant's counsel during the period beginning 2/20/05 and ending 10/27/06 results in 181.92 hours billed by Ms. Barringer-Thomson, 9.7 hours billed by Mr. Henson, and 16.5 hours billed by Ms. Barringer-Thomson's paralegal. Multiplication of these hours by the appropriate hourly rate results in a lodestar of \$34,853.50 for the period encompassing the Court's ruling finding Ms. Barringer-Thomson the prevailing party in the action and thus eligible for an award of attorneys' fees.

The Court finds a more stringent standard should be applied with regard to those fees incurred after the Court declared Ms. Foster the prevailing party and after she submitted her initial application for attorneys' fees. The Court finds itself in agreement with the plaintiffs' expert Mr. Meyers who observed an "increased, almost frenetic activity on the part of counsel for the defendant after it was determined that the Defendant was the prevailing party." See page 4 of the Final Report of D. Kent Meyers Regarding Defendant Attorneys' Fee Applications, attached as Exhibit B to Exhibit C of Plaintiffs' Brief Regarding the Reasonable Attorneys' fees to be Awarded to Defendant. The Court concurs with Mr. Meyers'

assessment that this “frenetic” activity suggest that the defendant’s counsel were failing to exercise the “billing judgment” required of lawyers anticipating that their bills will be submitted to the in conjunction with a fee application. See Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1257 (10th Cir. 2005). “Billing judgment consists of winnowing hours actually expended down to hours reasonably expended.” Id. While a portion of the defendant’s post-dismissal hours were spent defending against such maneuvers by the plaintiffs as their motions for clarification and for reconsideration, it appears that the defendant’s counsel spent an extraordinary amount of time seeking voluminous billing records from the plaintiffs and their various counsel and objecting to the plaintiffs’ requests that such records be kept confidential. Ms. Foster also spent unnecessary time resisting the plaintiffs’ quite reasonable attempt to discover her own fee agreement with counsel. Although the defendant’s counsel spent an enormous amount of time reviewing and organizing the plaintiffs’ billing records, they have proved to be of limited relevance and the defendant has failed to employ them in such a way as to establish the reasonableness of her own fee request. As a result, the extensive time counsel expended on securing and utilizing opposing counsel’s billings have provided little or no value to the defendant or the Court. For the foregoing reasons, the Court adopts in large measure the careful analysis set forth by Mr. Meyers in his final report with respect to those hours incurred by the defendant after 10/27/06.

In order to exclude from the lodestar calculation those post-dismissal hours reflecting a frenetic level of activity and a distinct lack of billing judgment, the Court finds that for the time period beginning 11/06/06 and ending 5/01/07, Ms. Barringer-Thomson’s billings should be reduced by 66.62 hours, Mr. Henson’s billings should be reduced by 8.5 hours (not including the 2.7 hour deduction set forth above as non-compensable time), and Ms. Barringer-Thomson’s legal assistant’s billings should be reduced by 4.3 hours. Subtracting these deductions from the total number of hours billed by the defendant’s counsel during the

period beginning 11/06/06 and ending 5/01/07 results in 136.20 hours billed by Ms. Barringer-Thomson, 11.2 hours billed by Mr. Henson, and 11.6 hours billed by Ms. Barringer-Thomson's paralegal. Multiplication of these hours by the appropriate hourly rate results in a lodestar for this period of \$26,723.00. The combined total lodestar amount is \$61,576.50. To the extent this amount exceeds that amount which Mr. Meyers opined was reasonable, the difference is primarily attributable to the plaintiffs' litigation tactics which helped prolong and complicate the matter. The adjusted lodestar of \$61,576.50 is entitled to a presumption of reasonableness. See Cooper v. State of Utah, 894 F.2d 1169, 1171 (10th Cir. 1990).

Having arrived at the presumptively reasonable lodestar for the case, the Court must next consider whether an upward or downward adjustment is mandated by the twelve factors set forth in Johnson v. Georgia Highway Express, Inc. The twelve Johnson factors are as follows: 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to the acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or other circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorney; 10) the "undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. 488 F.2d at 717-718. Several of the Johnson factors have already been integrated into the Court's determination of the proper hourly rate and reasonable hours expended. For example, the Court considered the time and labor required and the novelty and difficulty of the questions when determining the number of hours properly expended by the defendant's counsel in the case. Similarly, the Court considered the experience, reputation, and ability of the attorneys and the skill requisite to perform the legal service properly when setting the appropriate hourly rate. Having considered the remaining Johnson factors, the Court finds no cause to adjust the lodestar. There is no evidence that the

work on this case precluded the defendant's counsel from pursuing other employment. Neither is there evidence of a customary fee for similar litigation or awards in similar cases against which the lodestar can be compared. The defendant did not have a contingent fee agreement with her counsel nor did she impose limitations on her counsel that would suggest that a fee adjustment should be imposed. The defendant's counsel obtained a positive and favorable result, but not one that is so extraordinary or unexpected as to merit an enhancement of the lodestar. Finally, the case was not of an undesirable nature as would limit the defendant's access to counsel nor did the defendant share a relationship with counsel that would justify an adjustment of the lodestar. The Court therefore concludes that the defendant is entitled to recover her attorneys' fees in the amount of \$61,576.50.

3. The defendant is entitled to reimbursement of her expert witness' fee.

The plaintiffs argue that the defendant is not entitled to recover her full expert witness' fees as costs under § 505 because costs under that section are limited to those enumerated under 28 U.S.C. §§ 1920 and 1821 which limit witness fees to \$40 per day. In support of this proposition, the plaintiffs rely upon Artisan Contractors Ass'n. Of America, Inc., v. Frontier Ins. Co., 275 F.3d 1038 (11th Cir. 2001) and Pinkham v. Camex, Inc., 84 F.3d 292 (8th Cir. 1996). Those cases acknowledge that § 505 specifically permits prevailing parties to recover their "full costs," but conclude that language does not clearly evidence congressional intent to encompass costs outside the authorization of § 1920. It appears that this interpretation of § 505 represents a minority view. The First, Sixth, Seventh, and Ninth Circuits have all concluded that costs not taxable under § 1920 are nevertheless recoverable under § 505's "full costs" provision. See InvesSys, Inc. v. McGraw-Hill Companies, Ltd., 369 F.3d 16, 22 (1st Cir. 2004); Coles v. Wonder, 283 F.3d 789, 803 (6th Cir. 2002); Susan Wakeen Doll Co. v. Ashton Drake Galleries, 272 F.3d 441, 458 (7th Cir. 2001); and Twentieth Century Fox Film Corp. v. Entertainment Distributing, 429 F.3d 869 (9th Cir. 2005). This Court concludes that

those authorities represent the better reasoned view and the view most consistent with Tenth Circuit authority. The Tenth Circuit has long held that expert fees may be reimbursed as attorneys fees under statutory fee-shifting provisions. See Ramos v. Lamm, 713 F.2d at 559-560. The Court finds that the defendant is entitled to recover \$4,668.75 as reimbursement for her full expert witness fees, costs, and expenses.

4. Certain of the defendant's requested expenses are excessive and must be reduced to a reasonable rate.

Ms. Foster has submitted bills itemizing her expenses associated with this litigation in the amount of \$4,013.68. The vast majority of the itemized expenses are attributable to copying and printing documents essential to the litigation. In her statement, the defendant's lead counsel, Marilyn Barringer-Thomson, asserts that she charges clients from twenty cents to twenty-five cents per page for in-house copies and \$1.50 per page for incoming facsimiles and for documents stamped for creating paper files maintained by her office. Ms. Foster has not established that such a charge is reasonable in this community. The plaintiffs assert that a reasonable charge for such items is ten cents per page.

The Court finds that counsel's \$1.50 per page charged for documents printed, stamped and made part of counsel's paper files is clearly excessive. The Court's knowledge of practice within this community convinces it that a charge of twenty cents per page is generous. The defendant is, therefore, limited to twenty cents per page for in-house copying and for documents received by telecopier or downloaded from online sources for integration into counsel's paper files. Application of a twenty cent per page limit reduces the defendant's expenses by \$1,573.70, leaving the defendant with \$2,439.98 in expenses. The Court finds that amount to be reasonable and awards the defendant a reimbursement of her expenses in the amount of \$2,439.98.

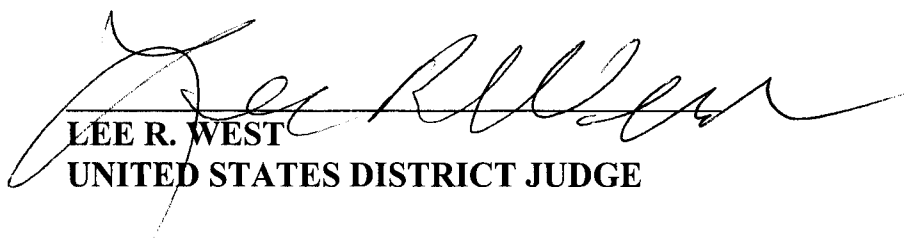
5. **Subject to the deductions set forth above, the defendant's entitlement to an award of attorneys' fees is not undermined by her decision to fully litigate the plaintiffs' claims against her.**

The plaintiffs argue that the defendant is not entitled to fees incurred after some point when she allegedly "could have avoided [fees] altogether but chose not to do so." Throughout the course of this litigation the plaintiffs have alleged that had the defendant appropriately assisted their copyright infringement investigation and litigation, she could have avoided being sued. The Court has rejected this argument on numerous occasions and declines to entertain it yet again. The defendant was entitled to litigate the claims the plaintiffs chose to bring against her and, as the prevailing party on those claims, she is entitled to recover the reasonable attorneys' fees she incurred in so doing.

Conclusion

Based upon the foregoing, the Court GRANTS the defendant Deborah Foster's application for attorneys' fees to the extent that the defendant, as the prevailing party, shall recover her attorneys' fees, including litigation expenses and costs, in the total amount of \$68,685.23.

ENTERED this 16th day of July 2007.


LEE R. WEST
UNITED STATES DISTRICT JUDGE