

**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 AS 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.

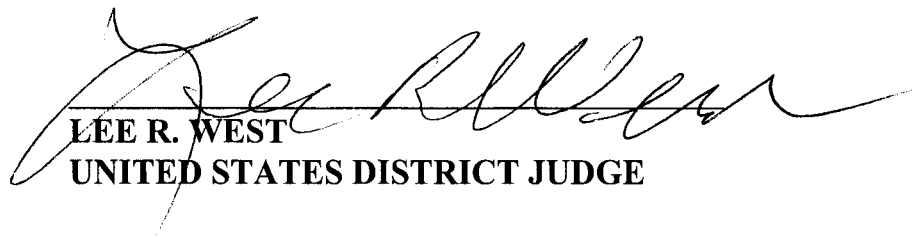
5. **Subject to the deductions set forth above, the defendant's entitlement to an award of attorneys' fees is not undermined by her decision to fully litigate the plaintiffs' claims against her.**

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