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CASES OF INTEREST

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IP/Entertainment Law Weekly Case Update For Motion Picture Studios And Television Networks

December 1, 2011

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Figure Eight Holdings, LLC v. Dr. Jay's, Inc., USDC C.D. California, November 18, 2011

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- District court awards defendants attorneys' fees for successful defense, finding plaintiff's claims were unreasonable in light of the dissimilarity of the two works, and the unreasonableness alone supported an award of attorneys' fees.

Following the district court's grant of summary judgment in favor of defendants on plaintiff's claims of copyright infringement, holding that defendants had not copied any protectable elements of plaintiff's graphic work "Treacherous" in designs on clothing that they sold, defendants moved for attorneys' fees as the prevailing party under the Copyright Act. The court granted the motion.

Under the Copyright Act, the court may, in its discretion, award a reasonable attorneys' fee to the prevailing party. The court may consider a number of factors in determining whether to award attorneys' fees, including, but not limited to, the degree of success attained, the non-prevailing party's objective unreasonableness, the non-prevailing party's frivolousness or motivation, and the considerations of compensation or deterrence. The district court concluded that an analysis of the various factors supported an award of attorneys' fees to defendants.

Defendants had prevailed on a motion for summary judgment and had achieved a complete success, securing the dismissal of plaintiff's copyright claims with prejudice, on the merits. Acknowledging that it had not found plaintiff's claims frivolous or motivated by bad faith, the court concluded that they were unreasonable in light of the dissimilarity of the two works at issue and that this unreasonableness alone supported an award of attorneys' fees. The court also found that considerations of compensation and deterrence weighed in favor of awarding defendants attorneys' fees: "While a prevailing plaintiff is compensated for victory through money damages or equitable remedies, prevailing defendants are left having expended funds, even in defense of unmeritorious claims." Finding their fee request reasonable, the court awarded defendants \$139,610.10.



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Seltzer v. Green Day, Inc., et al., USDC C.D. California, November 17, 2011

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- Court awards defendants attorneys' fees for successful fair-use defense to copyright infringement action, finding that the purpose of the Copyright Act and the objective unreasonableness of the claim alone justified an award of fees.

Plaintiff, an artist, sued defendants, members of the rock band Green Day and others, for copyright infringement, violations of the Lanham Act and violations of California law arising out of the use of "Scream Icon" image in a video montage of images shown during the band's live performances of its song *East Jesus Nowhere*. After the district court granted summary judgment in favor of defendants and dismissed all of plaintiff's claims, finding that defendants had made fair use of plaintiff's work and could not be liable for copyright infringement, defendants moved for attorneys' fees pursuant to the Copyright Act. The court granted defendants' motion and awarded defendants \$201,012.50.

The court held that the pivotal inquiry in whether to award fees is whether defendants' successful defense furthered the purposes of the Copyright Act. The court may look to several nonexclusive factors – the so-called "Lieb factors" after the Third Circuit's opinion in *Lieb v. Topstone Industries, Inc.* – and may apply them as long as they are consistent with the purposes of the Copyright Act and are applied evenly to prevailing plaintiffs and defendants. These factors include the degree of success obtained, frivolousness, motivation, the objective unreasonableness of the losing party's factual and legal arguments and the need, in particular circumstances, to advance considerations of compensation and deterrence.

The court rejected plaintiff's argument that attorneys' fees could not be awarded to a defendant that prevailed on a fair-use defense, holding it contrary to Supreme Court and Ninth Circuit precedent. Finding the case factually similar to the Ninth Circuit decision in *Fantasy, Inc. v. Fogerty*, the court noted the facts supporting defendants' fair use defense – defendants altered the copyrighted image by creating a photograph of a torn "Scream Icon" poster, altering color and contrast, adding a brick background and superimposing a red spray-painted cross over the image, incorporated the altered image in a much larger montage of images, and made the montage a backdrop to their live performance of a song – and reasoned that defendants' successful summary judgment motion "paved the way for the [d]efendants and others to manipulate and reinterpret street art in the creation of future multimedia compilations[.]" and gave the public access to these new works of compilation. Because defendants' successful defense enriched the general public by giving it access to creative works, paved the way for the creation of new works and furthered the important interest of the Copyright Act in demarcating the boundaries of copyright law, the court concluded that the fair use defense of the video backdrop and the *East Jesus Nowhere* live performance implicated the ultimate interests of copyright and should be encouraged.

In awarding defendants fees under the Copyright Act, the court also considered other factors enumerated in *Fantasy* and concluded that they tipped in favor of defendants. Defendants had achieved total success,



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prevailing on each of the plaintiff's claims, not on a technical defense but on summary judgment on the merits. The substantial benefit conferred by defendants' success – "the ability of photographers and other artists to manipulate images captured from everyday life, imbue them with their own artistic comment, and incorporate them into new works embodying moods, tones, and meanings distinct from the original" – as compared to the costs of litigation, also weighed in favor of awarding attorneys' fees. The court found that the parties' relative means could not be determined from the record and was therefore a neutral factor. Although plaintiff claimed to be "an artist with limited means" and defendants were "fabulously wealthy rock stars and record labels," the court found that plaintiff had failed to submit any evidence in support of these assertions.

The court also reviewed the *Lieb* factors not addressed by the analysis under *Fantasy* – frivolousness, motivation, and objective reasonableness – and concluded that they also supported the award of attorneys' fees to defendants. While the record was not sufficiently complete or clear to attribute an invidious motive to the plaintiff, and plaintiff's claims were not frivolous, the court found they were not objectively reasonable. Noting that plaintiff failed to raise a triable issue of fact as to any of his claims and defendants had established fair use as a matter of law the court concluded that plaintiff's claims were both contradicted by established law and "factually unreasonable."

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