



## INTRODUCTION

This copyright infringement case arises out of substantial copyright infringement that took place through Defendant George Dennis' Internet account. Plaintiffs' initial investigation revealed that Defendant's Internet account was used to distribute 541 digital music files to millions of other individuals who utilize the Internet to engage in illegal file-swapping. Defendant denies liability and, for the first time in an Affidavit attached to his Motion, claim that his only possible connection to the illegal downloading could have been through his teenage daughter who lives at a different address than Defendant. (Aff. George Dennis, Doc. 13)

In his affidavit attached to his Motion, Defendant denied liability and identified his teenage daughter as the potential direct infringer. Defendant's assertion, which failed to identify his daughter by name, or state with any certainty whether his daughter in fact engaged in copyright infringement, required further investigation by Plaintiffs. Such further investigation has not exonerated Defendant, but has led Plaintiffs to believe that Defendant's daughter is responsible for the direct infringement of Plaintiffs' copyrights.

Immediately after receiving the information linking Defendant's daughter to the infringement of Plaintiffs' copyrights, Plaintiffs attempted to resolve this matter. Had Defendant's counsel not completely refused to discuss the subject of settlement, Plaintiffs would have informed Defendant that they were willing to resolve their claims by way of a global settlement with Defendant and any other members of Defendant's family who might be responsible for the infringement of Plaintiffs' copyrights including Defendant's daughter. Unfortunately, Defendant's counsel wholly refused to discuss any aspect of settlement with

Plaintiffs and refused to have her client investigate the facts surrounding the copyright infringement that occurred on his Internet account.

Because Plaintiffs' efforts to discuss settlement, let alone resolve this matter, were stymied by Defendant's counsel who refused to even discuss the subject, Plaintiffs conducted their own investigation based on the information provided in Defendant's affidavit. Plaintiffs now intend to pursue their claims against Defendant's daughter in another action. Accordingly, Plaintiffs do not object to the dismissal without prejudice of the present action against George Dennis. Despite the fact that George Dennis' self-serving affidavit does not exonerate him in this action, Plaintiffs see no useful purpose at this time in expending substantial resources seeking a judgment against Defendant, which judgment could be duplicative of the judgment that Plaintiffs believe they will obtain from the direct infringer.

#### STATEMENT OF FACTS

Plaintiffs are major recording companies who own copyrights in sound recordings. Collectively, they face a massive problem of digital piracy over the Internet. Indeed, the Supreme Court recently characterized the magnitude of online peer-to-peer ("P2P") piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2782 (2005).

P2P networks are online media distribution systems that allow users to transform their computers into interactive Internet sites for swapping copyrighted sound recordings with other users. As a direct result of piracy over P2P networks, Plaintiffs have sustained and continue to sustain devastating financial losses. Plaintiffs' losses from on-line music piracy have resulted in layoffs of thousands of employees, diminished royalties to artists, and significant financial losses.

As the United States Supreme Court recently reaffirmed, P2P users who disseminate (upload) and copy (download) copyrighted material violate the Copyright Act. *See Grokster*, 125 S. Ct. at 2770-72; *see also BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (“[P]eople who post or download music files are primary infringers.”). A copy downloaded, played, and retained on one’s hard drive for future use is a direct substitute for a purchased copy. *Gonzalez*, 430 F.3d at 891. It is in this context that Plaintiffs brought the current copyright infringement action against Defendant.

On August 4, 2005, Plaintiffs’ investigator found an individual with the screen name “music900@KaZaA” using the KaZaA online media distribution system over a P2P network. This individual had 541 music files on his or her computer and was distributing them freely to the millions of people who use P2P networks. On information and belief, this individual had previously downloaded all or many of these sound recordings without the permission of the record company copyright owners. Plaintiffs determined that the individual used Internet Protocol (“IP”) address 68.222.100.107 to connect to the Internet and perform the illegal copying and infringing activity.

Plaintiffs brought a “John Doe” action against this otherwise anonymous individual. Plaintiffs sought and obtained a federal court order allowing expedited discovery and authorizing a subpoena of this individual’s Internet Service Provider (“ISP”), BellSouth.net, Inc. (“BellSouth”). BellSouth identified George Dennis, the Defendant, as the individual to whom the IP address at issue was registered.

On December 16, 2005, counsel for Plaintiffs sent a letter to Defendant in an attempt to resolve this matter with the least amount of burden and expense to all parties. (*See Letter dated December 16, 2005*, attached hereto as *Exhibit A.*) Defendant did not respond to Plaintiffs’

attempt at resolution. Prior to filing suit against Defendant, Plaintiffs again attempted to contact Defendant to resolve this matter. On November 6, 2006, a representative of Plaintiffs spoke with Defendant. Defendant denied liability, but gave no indication that anyone else was involved or indeed that his daughter had access to his Internet account. Based on the evidence gathered by Plaintiffs' investigators and the ISP's subpoena response and Defendant's own failure to provide any plausible explanation for what happened, Plaintiffs filed the instant action on January 23, 2007. Defendant was served with the Complaint on February 7, 2007. After Plaintiffs agreed to allow Defendant an extension to answer the Complaint, Defendant filed his Motion to Dismiss and/or Motion for Summary Judgment on March 29, 2007. Filed with Defendant's Motion was Defendant's affidavit, in which Defendant, for the first time, gave any indication that someone else was responsible for the infringement that occurred on his Internet account.

Approximately two weeks later, on April 13, 2007, Plaintiffs' counsel contacted Defendant's counsel to discuss the case in light of the information provided for the first time in Defendant's affidavit. During that phone call, Plaintiffs' counsel explained Plaintiffs only intended to pursue claims against individuals responsible for copyright infringement. Plaintiffs counsel further stated that Plaintiffs would likely dismiss the case against Defendant if Defendant would attest he was not the direct infringer and would cooperate in identifying the individual who engaged in direct infringement using his Internet account. Plaintiffs' counsel, in an effort to expedite resolution of this matter, agreed to reconfirm with BellSouth the identity of the holder of the Internet account with the IP address 68.222.100.107, to ensure there was no misidentification on the part of the Internet Service Provider. Plaintiffs' counsel then requested that Defendant simply ask his daughter what happened, so that both parties could work towards

resolution of this matter. Defendant's counsel responded "we're not going to do that" and instead began posturing about attorneys' fees.

Following this telephone conversation, Plaintiffs' counsel again attempted to resolve this matter and sent Defendant a letter on April 13, 2007 making clear that Plaintiffs' position was they were only interested in pursuing those individuals who are directly or indirectly responsible for the illegal uploading, downloading and distribution of Plaintiffs' copyrighted works and that if Defendant was willing to sign an affidavit identifying the infringer, Plaintiffs would investigate and take all appropriate action, including potentially dismissing the suit against Defendant without prejudice and pursuing the actual direct infringer. (See Letter dated April 13, 2007, attached as *Exhibit B*). Defendant responded by accusing Plaintiffs of making misrepresentations and refusing to communicate with Plaintiffs' counsel other than in writing. (See E-mail dated April 16, 2007 and Letter dated April 18, 2007, attached as *Exhibit C*).

After concluding that Defendant would in no way assist in identifying the actual infringer in this case, beyond his ambiguous statement in his affidavit regarding his daughter, Plaintiffs conducted their own investigation and through their own efforts, have concluded upon information and belief, that Defendant's daughter, living at 89 Cottonwood Dr., Madison, Mississippi, 39110, is responsible for the direct copyright infringement associated with Defendant's Internet account.

Plaintiffs' counsel then immediately attempted to contact Defendant's counsel to resolve this matter, requesting via e-mail that Defendant's counsel call to discuss the matter. (See E-mail dated April 25, 2007, attached as *Exhibit D*). Defendant's counsel did not respond. The next day, having not heard back from Defendant, Plaintiffs sent another e-mail, telling Defendant that, based on Defendant's affidavit and Plaintiffs' resulting investigation, Plaintiffs were willing to

stipulate to a dismissal with prejudice of the current action. (See E-mail dated April 26, 2007, attached as *Exhibit E*). Plaintiffs were met with the response that Defendant would only agree to a dismissal if Plaintiffs agreed to reimburse Defendant for his attorneys fees. (See E-mail dated April 27, 2007, attached as *Exhibit F*).

### ARGUMENT

#### A. Standard of Review.

Attorneys' fees are discretionary and are not awarded as a matter of course in every case. See *Creations Unlimited, Inc. v. McCain*, 112 F.3d 814, 817 (5th Cir. 1997) (upholding a refusal to award attorneys' fees based on application of the *Fogerty* factors); see also *Womack + Hampton Architects, LLC v. Metric Holdings LP*, No. 03-50549 cons. w/ Case No. 03-50859, 2004 U.S. App. LEXIS 12293, at \*\*21-24 (5th Cir. June 22, 2004) (affirming the district court's denial of attorneys' fees based on application of the *Fogerty* factors). A refusal to award attorneys' fees under the Copyright Act is within the sound discretion of the district court. *Id.*

In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Supreme Court outlined four non-exclusive factors to guide the district courts in determining whether to award attorneys' fees: (1) frivolousness, (2) the parties' motivation, (3) objective unreasonableness, and (4) the need in particular circumstances to advance considerations of compensation and deterrence. *Id.* at 534 n.19; see also *Galiana and Gianna, Inc. v. Harrah's Operating Co., Inc.*, 416 F.3d 411, 423 (5th Cir. 2005) (vacating and remanding an award of attorneys' fees for failing to provide *Fogerty* analysis.)

Applying the *Fogerty* framework here, Defendant's request for fees should be denied because (1) Plaintiffs' claim was neither frivolous nor objectively unreasonable in either its factual allegations or its legal underpinnings; (2) there is no evidence to suggest any inappropriate motivation by Plaintiffs in bringing the lawsuit, and (3) there is no need to

compensate Defendant for a lawsuit that could have been avoided had he simply explained the basis for his denial at any of the points Plaintiffs contacted him, prior to the filing of this lawsuit. Indeed, if any fees were to be awarded, it should be to Plaintiffs, given Defendant's obstructionist conduct here.

**B. Defendant's request for an award of attorneys' fees is contrary to the policies underlying the Copyright Act, runs counter to each of the *Fogerty* factors, and should be denied.**

- 1. Five other federal courts have applied the *Fogerty* factors to circumstances virtually identical to those presented here and have rejected demands for attorneys' fees by defendants.**

In five federal cases, with factual scenarios almost identical to this case, courts have applied the *Fogerty* factors and other relevant case law and have declined to award fees against the record company plaintiffs. See *Perez*, slip opinion at 5-7 (*Exhibit G*); *Darwin*, slip opinion at 2-3, 8-11 (*Exhibit H*); *O'Leary*, 2006 U.S. Dist. LEXIS 5115, at \*4 (*Exhibit I*); *Chan*, 2005 WL 2277107, at \*2 (*Exhibit J*); *Thompson*, slip opinion at 2-3 (*Exhibit K*).

Each of the above cases involved claims of copyright infringement where, as here, the defendant's ISP identified the defendant as the owner of the Internet account through which the infringement was occurring. In *Perez*, the defendant hid the identity of family members who were the direct infringers. After the Plaintiffs learned their identity through discovery, they dismissed their claims against the defendant. See *Perez*, slip opinion at 5 (*Exhibit G*). In *Darwin*, the defendant concealed the identity of his roommate. After the Plaintiffs' learned the roommate's identity through discovery, they dismissed their claims against the defendant. See *Darwin*, slip opinion at 10-11 (*Exhibit H*). In *O'Leary*, the Plaintiff Record Companies dismissed their claims against the defendant while the case was in its infancy to pursue claims against the direct infringer. See *O'Leary*, 2006 U.S. Dist. LEXIS 5115, at \*3-4 (*Exhibit I*). In *Chan*, the defendant refused to identify which of her family members had used the iMesh



username in question. Once the plaintiffs learned this information in discovery, they dismissed their claim against the defendant. See *Chan*, 2005 WL 2277107, at \*1 (*Exhibit J*). In *Thompson*, Defendant waited until after he filed a counterclaim demanding attorneys' fees and costs to identify his "adult daughter" as the infringer. Plaintiffs, who then determined the identity of Defendant's daughter through their own efforts, immediately moved to dismiss the suit. See *Thompson*, slip at 2-3 (*Exhibit K*).

On these facts, the courts in *Perez*, *Darwin*, *O'Leary*, *Chan* and *Thompson* all found that the Plaintiff Record Companies had acted appropriately in their efforts to pursue claims only against those individuals responsible for copyright infringement, and rejected the respective defendants' claims for attorneys' fees. See *Perez*, slip opinion at 5-7 (exercising discretion not to award attorneys' fees) (*Exhibit G*); *Darwin*, slip opinion at 11 ("[D]efendant fails to show that the Court should exercise its discretion and award attorney's fees based on the *Fogerty* factors even though defendant is the prevailing party.") (*Exhibit H*); *O'Leary*, 2006 U.S. Dist. LEXIS 5115, at \*4-5 ("[I]t is clear that Plaintiffs were only interested in one thing: knowing who was allegedly infringing their copyrights so they could bring an action against that person.") (*Exhibit I*); *Chan*, 2005 WL 2277107, at \*2 ("Plaintiffs have been trying to take action against only those party [sic] responsible. To the extent [the Defendant] has incurred legal fees in this action, such fees are primarily the result of tactics designed to impede the ability of Plaintiffs to prosecute this action in an efficient manner.") (*Exhibit J*); *Thompson*, slip opinion at 2-3. ("Plaintiffs brought an objectively reasonable suit to protect their copyrights. The Court is not persuaded that plaintiffs have acted in bad faith or maliciously so that they should be deterred from the same conduct in the future. On the contrary, it appears that [Defendant]'s conduct in

failing to respond to plaintiff's pre-suit communications and to disclose the identity of the true infringer served to delay the prompt resolution of this litigation.") (*Exhibit K*).

The facts of *Perez*, *Darwin*, *O'Leary*, and *Chan* are virtually identical to the facts presented here. For the same reasons that each of those courts denied the defendants' motions for attorneys' fees in those cases, this Court should deny Defendant's motion for fees here.

Furthermore, in *Warner Bros. et al. v. Duarte*, Slip opinion (*Exhibit L*), the Court denied a Motion to Dismiss and Motion for Summary Judgment virtually identical to the one filed by Defendant here finding that an Affidavit denying liability was insufficient to dismiss the Complaint and finding that Plaintiffs had "competent summary judgment evidence" to support their claim. *Id.* at 3.

**2. Plaintiffs' lawsuit was neither frivolous nor objectively unreasonable.**

Under *Fogerty*, when a claimant's factual allegations and legal theories are not frivolous, a court should exercise its discretion against awarding attorneys' fees. *See Creations Unlimited v. McCarn*, 889 F. Supp. at 952, 954 (S.D. Miss. 1995). In no way can this action be described as frivolous, legally or factually.

To begin with, it is beyond dispute that Plaintiffs' claims against Defendant are well grounded in the law. Peer-to-peer users who download and distribute copyrighted material over the Internet without the permission of the copyright holder violate the Copyright Act. *See Grokster*, 125 S. Ct. at 2770-72 (noting that even the providers of P2P networks "concede infringement" by the individual users); *Aimster*, 334 F.3d at 645 ("[M]aking . . . a digital copy of [copyrighted] music . . . infringes copyright."); *Gonzalez*, 430 F.3d at 893 (affirming summary judgment where the defendant admitted to downloading copyrighted sound recordings over the Internet); 2 M. & D. Nimmer, NIMMER ON COPYRIGHT § 8.08[A][1], at 8-115 ("[The] input of a

work into a computer results in the making of a copy, and hence . . . such unauthorized input infringes the copyright owner's reproduction right.").

Turning to the facts, Plaintiffs discovered substantial evidence of copyright infringement through an IP address that Defendant's ISP, BellSouth, identified as belonging to Defendant. This person was unlawfully distributing more than 500 digital music files over the Internet, including many sound recordings of which Plaintiffs are the copyright owners or licensees of exclusive rights under United States copyright. (See Exhibit B to Plaintiffs' Complaint.) None of these facts are in dispute. On this basis alone, Plaintiffs were proper in bringing a lawsuit against Defendant, and every court that has addressed this issue in cases similar to this one have so held. See, e.g., *Perez*, slip opinion at 5-7 (exercising discretion not to award fees) (*Exhibit G*); *Darwin*, slip opinion at 9-10 (finding that the plaintiffs' lawsuit was neither frivolous nor objectively unreasonable) (*Exhibit H*); *O'Leary*, 2006 U.S. Dist. LEXIS 5115, at \*4 (finding the plaintiffs' actions reasonable) (*Exhibit I*); *Chan*, 2005 WL 2277107, at \*2 (same) (*Exhibit J*); *Thompson*, slip opinion at 203 ("Plaintiffs brought an objectively reasonable suit to protect their copyrights.") (*Exhibit K*).

**3. Plaintiffs' voluntary dismissal shortly after Defendant finally identified the direct infringer further demonstrates the objective reasonableness of Plaintiffs' actions.**

The litigation tactics employed by both parties are relevant to determining objective unreasonableness under *Fogerty. Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 627-28 (6th Cir. 2004). Here, Plaintiffs' litigation tactics demonstrate the objective reasonableness of this lawsuit.

Plaintiffs in this case sought early on to identify the individual most culpable for the copyright infringement discovered in Defendant's household and to engage in settlement discussions with the responsible party. Plaintiffs had more than enough information to file suit

against Defendant without even bothering to contact him, but they tried nonetheless multiple times to contact Defendant to discuss this matter. After Defendant finally identified his “teenaged daughter,” Plaintiffs again acted diligently to conduct their own investigation to determine her name and contact information. Plaintiffs could have chosen instead to press Defendant for the name and address of his “teenaged daughter” through formal discovery, but did not. Based on their own investigation and with no assistance from Defendant, once Plaintiffs determined that the direct infringer was likely Defendant’s daughter, Plaintiffs acted quickly to resolve this lawsuit. However, now Defendant seeks to needlessly continue this suit in order to seek unjustified attorneys’ fees.

**4. Plaintiffs’ sole motive of protecting their copyrights is entirely faithful to the purposes Copyright Act.**

It is inconsistent with the purposes of the Copyright Act to “deter plaintiffs . . . from bringing suits when they have a reason to believe, in good faith, that their copyrights have been infringed.” *Keboeaux v. Schwegmann Giant Super Mkts., Inc.*, 1994 U.S. Dist. LEXIS 13072, at \*3 (E.D. La. 1994). Here, Plaintiffs’ sole motivation for filing a lawsuit against Defendant was to protect their copyrights in potentially hundreds of sound recordings that were stolen and unlawfully distributed through Defendant’s Internet account. This motive arises from the devastating economic effects on the recording industry caused by individuals who download and distribute millions of perfect digital copies of Plaintiffs’ copyrighted works. *See, e.g., Gonzalez*, 430 F.3d at 890 (“A copy downloaded, played, and retained on one’s hard drive for future use is a direct substitute for a purchased copy—and without the benefit of the license fee paid to the broadcaster.”). This motive is entirely faithful to the purposes of the Copyright Act and an award of attorneys’ fees would be inappropriate under this *Fogerty* factor.

**5. An award of attorneys' fees to Defendant would not advance the goals of compensation and deterrence.**

The final *Fogerty* factor is whether an award of attorneys' fees is necessary to, or would further the interests of, the compensation or deterrence goals of the Copyright Act. This factor, too, favors Plaintiffs.

**a. Plaintiffs' conduct is consistent with the policies underlying the Copyright Act.**

As the Fifth Circuit explained, "the core purpose of copyright law is 'to secure a fair return for an author's creative labor' and thereby 'to stimulate artistic creativity for the general public good.'" *Veeck v. Southern Building Code Congress Int'l Inc.*, 241 F.3d 398, 402 (5th Cir. 2001). "The touchstone of attorneys' fees under § 505 is whether imposition of attorneys' fees will further the interests of the Copyright Act, *i.e.*, by encouraging the raising of objectively reasonable claims and defenses, which may serve not only to deter infringement but also to ensure 'that the boundaries of copyright law [are] demarcated as clearly as possible' in order to maximize the public exposure to valuable works." *Mitek Holdings, Inc. v. Arce Eng'g Co.*, 198 F.3d 840, 842-43 (11th Cir. 1999) (quoting *Fogerty*, 510 U.S. at 526-27). The imposition of a fee award against a copyright holder who has gathered undisputed evidence that their rights have been infringed would not promote the "core purpose of copyright law." *See id.* (reversing an award of fees to the defendant).

In the present case, Plaintiffs brought an objectively reasonable claim in the interests of protecting valid copyrights, and the actual infringement of Plaintiffs' copyrights is not contested. After trying unsuccessfully to resolve the matter prior to litigation, Plaintiffs filed a lawsuit based upon objectively reasonable evidence. As soon as Defendant finally revealed that someone else was the direct infringer, Plaintiffs agreed to dismiss the case against him, notwithstanding viable claims of vicarious liability and contributory infringement, and to pursue

claims against the direct infringer. No purpose of the Copyright Act would be served by deterring Plaintiffs from such conduct through an award of fees to Defendant.

**b. Defendant's conduct should be discouraged, not encouraged.**

Nor would an award of fees to Defendant serve any purpose of the Copyright Act. Defendant does not assert a "meritorious copyright defense" worthy of encouragement. *See Fogerty*, 510 U.S. at 527. Instead, he asserts a "gotcha" defense, acknowledging that infringement occurred through his Internet account, but withholding information about those directly responsible for such infringement while he builds a motion for attorneys' fees. No purpose of the Copyright Act would be served by encouraging such conduct.

Defendant knew all along that his daughter used his Internet account and was the likely infringer. Yet Defendant waited until after Plaintiffs made several attempts to discuss this case with him, and until a motion with a request for attorneys' fees was filed to reveal this information. Defendant intentionally and unnecessarily prolonged and complicated these proceedings by withholding information, information which would have resulted in much earlier termination of this suit. An award of fees to Defendant under these circumstances would run directly counter to the goal of encouraging "objectively reasonable claims and defenses." *See Mitek Holdings*, 198 F.3d at 842-43.

**CONCLUSION**

For the above reasons, Plaintiffs do not object to this case being dismissed without prejudice. Plaintiffs respectfully request, however, that this Court deny Defendant's request for attorneys' fees and dismiss this case without prejudice, with each party to bear its or his own costs and fees.

Date: May 7, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 7, 2007 a copy of the foregoing PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND/OR SUMMARY JUDGMENT has been electronically filed with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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