

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HEALTHCARE ADVOCATES, INC.,

Plaintiffs,

v.

No. 05-03524

HARDING, EARLEY, FOLLMER & FRAILEY;
et al,

Defendants.

DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS

All defendants, Harding, Earley, Follmer & Frailey, John F.A. Earley, III, Frank Bonini, Charles L. Riddle and Kimber Titus ["Harding, Earley"], by and through the undersigned attorneys, Jeffrey P. Lewis, Esquire, Shannon B. Stewart, Esquire, and McKissock & Hoffman, P.C., move this Court for attorneys' fees and costs pursuant to Section 505 of the Copyright Act,¹ and in support thereof aver the following:

1. Plaintiff Healthcare Advocates asserted a claim against Harding Earley for copyright infringement for viewing and printing text and images originally made publicly available by Healthcare Advocates from prior versions of Healthcare Advocates' public website, which had been archived by Internet Archive; unwittingly caching copies of those web pages; and purportedly sharing copies of the text and images with other counsel in an underlying action for trademark infringement and misappropriation of trade secrets.

¹ Because plaintiff asserted several counts for claims other than copyright infringement, Harding Earley contends that it is automatically entitled to costs pursuant to 28 U.S.C. § 1920 and, accordingly, will file a bill of costs at the appropriate time. Notwithstanding, to preserve its rights, Harding Earley asks this court to award costs to the extent that it must exercise its discretion to do so under Section 505 of the Copyright Act.

2. Representing defendants in the underlying action, Harding Earley obtained archived versions of Healthcare Advocates' website, printed them and provided them to the court for *in camera* review.

3. By operation of the computer technology, and not by any act or omission by defendant, as Harding Earley obtained the archived materials, the computer saved a temporary version of the file, a "cache," and Harding Earley printed the archived materials consistent with its duty to preserve evidence.

4. Healthcare Advocates grounded its claims in this action on the position that the above acts constituted copyright infringement.

5. This Court entered summary judgment in favor of Harding Earley on all claims by Healthcare Advocates, including its claims for copyright infringement.

6. Section 505 of the Copyright Act permits awards of costs to a party, and of attorneys' fees to a prevailing party. 17 U.S.C.A. § 505.

7. "Costs" under section 505 pertain to those delineated in 28 U.S.C. § 1920.

8. Attorneys fees in the amount of \$161,461.50 and costs amounting to \$9,348.60, were incurred to defend all of the defendants in the above captioned matter, which attorneys fees are fair and reasonable.

9. For the reasons set forth in the following memorandum of law, this Court should enter an award for attorneys' fees in the amount of \$161,461.50, and for costs amounting to \$9,348.60 in favor of all defendants and against plaintiff, Healthcare Advocates, Inc.

WHEREFORE, all defendants respectfully requests that this Honorable Court enter an order in the form proposed, thereby awarding it attorneys' fees and costs totaling \$170,810.10.

Respectfully submitted,

McKissock & Hoffman, P.C.

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UNITED STATES DISTRICT COURT
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Plaintiffs,	:	
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HARDING, EARLEY, FOLLMER & FRAILEY;	:	
et al,	:	
	:	
Defendants.	:	
	:	

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT’S MOTION FOR ATTORNEYS’ FEES AND COSTS**

Preliminary Statement

A prevailing defendant in a copyright infringement action can recover attorneys’ fees when a plaintiff files a frivolous or unreasonable claim with dubious motive, and an award of attorneys’ fees would deter similar claims and compensate the defendant. Healthcare Advocates, Inc. [“Healthcare Advocates”] asserted a baseless and hollow claim for copyright infringement to chastise Harding, Earley, Follmer & Frailey [“Harding Earley”] for successfully defending a claim brought by Healthcare Advocates against a third party. An award of attorneys’ fees in this action would discourage similar claims and compensate Harding Earley and the carrier who paid the attorneys fees incurred in defending Harding Earley. The Copyright Act and applicable law entitle Harding Earley to attorneys’ fees.

The Copyright Act and 28 U.S.C. § 1920 entitle prevailing defendants to costs associated with defending a claim for Copyright infringement. This Court awarded summary judgment to Harding Earley in this copyright infringement action. Harding Earley can recover costs from Healthcare Advocates.

I. FACTS

Healthcare Advocates filed this action alleging that Harding Earley committed copyright infringement by viewing and printing text and images originally made publicly available by

Healthcare Advocates from prior versions of Healthcare Advocates' public website which had been archived by Internet Archive; unwittingly caching copies of those web pages; and purportedly sharing copies of the text and images with counsel for other parties in an underlying action for trademark infringement and misappropriation of trade secrets. *See Flynn et al. v. Health Advocates, Inc., et al.*, Civil Action No. 03-3764 ["underlying matter"]. As part of its defense to the underlying matter, defendants John F.A. Earley, III, Charles L. Riddle, Frank J. Bonini, Jr., together with a temporary employee, defendant Kimber Titus, directly or indirectly engaged in printing copies of Healthcare Advocates' copyrighted materials contained on websites archived by Internet Archive. Harding Earley then submitted these materials to this court in the underlying matter for an *in camera* review as evidence in response to a motion filed by Healthcare Advocates. *See Docket In Underlying Matter* (Exhibit "A"); *Second Amended Complaint For Violations Of The Digital Millennium Copyright Act, Copyright Infringement, Violations Of The Computer Fraud And Abuse Act, And Related Violations Of Common Law* ["*Second Amended Complaint*"], ¶ 65. In that motion, which this court denied, Healthcare Advocates and its president, Kevin Flynn, attempted to join Earley, Riddle and Bonini as defendants for the same conduct that Healthcare Advocates now complains of in the present action. *See Flynn v. Health Advocates, Inc.*, 2004 WL 1588235 (E.D. Pa. 2004).

This court later granted summary judgment in the underlying action in favor of all defendants, which judgment the Third Circuit affirmed. *See Flynn v. Health Advocates, Inc.*, 2005 WL 288989 (E.D. Pa. 2005); *Flynn v. Health Advocates, Inc.*, 169 Fed. Appx. 99 (3d Cir. 2006). Therefore, this action constitutes the second attempt by Healthcare Advocates to sue the lawyer defendants who represented the prevailing parties in the underlying matter. *Second*

Amended Complaint, ¶ 65.

In this matter, Healthcare Advocates asserted both federal and state claims against the Harding Earley, including claims for copyright infringement. Healthcare Advocates contended that Harding Earley infringed its copyright by accessing and downloading archived Healthcare Advocates' material digitally stored by Internet Archive at www.archive.org. *See Second Amended Complaint*. Harding Earley moved this Court for summary judgment on all claims not previously withdrawn, which Healthcare Advocates asserted in its second amended complaint, including for claims of copyright infringement. *See* 2007 WL 2085358 (E.D. Pa. Jul. 20, 2007).

Approximately \$161,461.50 in attorneys' have been incurred by and on behalf of Harding Earley relating to this action. *See* a true and correct copy of the billing records pertaining to this action attached hereto as Exhibit "A". Approximately \$9,348.60 in costs have been incurred by or on behalf of Harding Earley relating to this action. *See* a true and correct copy of the expense ledger pertaining to this action attached hereto as Exhibit "B".

II. LEGAL ARGUMENT

A. Attorneys' Fees

The Copyright Act permits recovery of attorneys' fees and costs to a prevailing party.

Section 505 states,

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C.A. § 505. Prevailing parties, whether plaintiffs or defendants, stand on equal footing with respect to whether they can recover attorneys' fees. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517,

114 S.Ct. 1023 (1994). *Fogerty* dispenses with the approach followed by the Ninth Circuit, dubbed the “dual approach”, which allowed prevailing plaintiffs to recover attorneys’ fees as a matter of course, but required prevailing defendants to prove that a plaintiff’s case was frivolous or filed in bad faith. *Id.* at 533, 114 S.Ct. at 1032-33.

In *Fogerty v. Fantasy, Inc.*, the United States Supreme Court assesses whether courts should apply the Third Circuit’s “evenhanded” approach to awards of attorneys’ fees, or take the “dual approach” followed by the Ninth Circuit. *Fogerty* rejects the “dual approach” and concludes the following:

- Courts have discretion to award attorneys’ fees;
- The Copyright Act does not limit fee awards to only exceptional cases;
- Courts must treat prevailing plaintiffs and prevailing defendants alike in considering fee awards;
- There exists no rule or formula for determining awards; and
- Courts must always consider the purposes of the Copyright Act in making fee awards.

Fogerty, supra.

A court may award attorneys’ fees only to prevailing parties. 17 U.S.C.A. § 505. Where a court awards summary judgment to a party to the claims, the awarded party becomes the prevailing party. *See, e.g., Lowe, supra; Cottrill v. Spears*, 2003 WL 2155105 (E.D. Pa. Jul. 2, 2003).

Once a court determines that it may award attorneys’ fees, it should evaluate several non-exclusive factors to evaluate the propriety of such an award. *Id.* at 534, 114 S.Ct. at 1033 n.19 (citing *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151 (3d Cir. 1986)). Four factors enter the

decision-making:

- Frivolousness of the non-prevailing party's infringement claim;
- Motivation for filing the infringement claim;
- Objective unreasonableness of the infringement claim; and
- Whether an award will deter similar actions and compensate the prevailing party.

Id.

Lowe provides an example of a claim found to have been frivolous. In *Lowe*, the plaintiff asserted that defendants infringed his copyrights by using his song; however, plaintiff later admitted that he granted defendants a nonexclusive license to use the work. *Lowe, supra*.

Moreover, *Nimmer on Copyright* offers support for the use of copyrighted materials for litigation, stating,

[W]orks are customarily reproduced in various types of judicial proceedings, including obscenity and defamation actions, to say nothing of copyright infringement actions, and it seems inconceivable that any court would hold such reproduction to constitute infringement either by the government or by the individual parties responsible for offering the work in evidence.

4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.05[D][2] (2003) [citing *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992) (quoting treatise); *Images Audio Visual Prods., Inc. v. Perini Bldg. Co., Inc.*, 91 F. Supp. 2d 1075, 1081-82 (E.D. Mich. 2000) (quoting treatise); *Castle Rock Entm't v. Carol Publ'g. Group, Inc.*, 150 F.3d 132, 143 (2d Cir. 1998) (citing treatise); *see, also, Lucent Info. Mgmt., Inc. v. Lucent Techs., Inc.*, 5 F. Supp. 2d 238, 242 (D. Del. 1998); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003) (affirming district court's finding of fair use of a work in a judicial proceeding and vacating the district court's denial of 17 U.S.C. § 505 attorneys fees and Rule 11 sanctions).

Objective unreasonableness considers both the legal and factual elements of an action. *Schiffer Pub., Ltd., supra* at 4. A legal position that fails to clarify the extent of protections provided by the Copyright Act may be deemed legally unreasonable. *Id.* at 5. When a plaintiff offers weak factual elements to support his case, a court may characterize his case as factually unreasonable. *Id.*

A plaintiff files an improperly motivated claim if he does not intend in good faith to protect a valid copyright interest, but seeks to financially damage another. *See id.* (citing *Yankee Candle Co. v. Bridgewater Candle Co., LLC*, 140 F.Supp.2d 111, 116 (D.Mass. 2001)).

An award of attorneys' fee must also deter future actions and compensate the prevailing party. *Lieb, supra; see also, Schiffer Pub., Ltd., supra* at 6. Compensation seeks to allow equal access to the courts, and prevents seemingly small infringement cases from going unchallenged due to the high costs of litigation. *Schiffer Pub., Ltd., supra* at 6 (citations omitted). Compensation also promotes the objectives of the Copyright Act. *Id.* (citing *Fogerty, supra* at 534 n.19).

Finally, after a court deems a fee award proper, it must determine whether the amount sought by the prevailing party is reasonable in light of the circumstances of the case. *Lowe v. Loud Records*, 2004 WL 527831 (E.D. Pa. Mar. 17, 2004) (citing *Lieb, supra*, at 156). To do so, the court calculates a lodestar, representing a reasonable number of hours expended defending successful claims, multiplied by a reasonable hourly rate. *Schiffer Pub., Ltd. v. Chronicle Books, LLC*, 2005 WL 1244923, 8 (E.D. Pa. May 24, 2005). The court can then adjust the lodestar up or down depending on five considerations:

- The degree of success achieved by the prevailing party;

- The relative complexity of the case;
- The relative financial strength of the parties;
- Whether damages were awarded; and
- Whether the losing party exhibited bad faith.

Id. at 11. The actual attorneys fees incurred here were based upon an hourly rate of \$165 for shareholders and \$135 for associates, which Harding Earley would challenge plaintiff to contend that they are not fair and reasonable.

B. Costs

Section 505 of the Copyright Act and 28 U.S.C. § 1920 permit a prevailing party to recover costs of litigation. The Copyright Act provides the court discretion to “allow recovery of full costs by or against any party other than the United States or an officer thereof.” 17 U.S.C.A. § 505. Title 28 Section 1920 sets forth the costs taxable against another party:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920; *see also*, *Schiffer Pub., Ltd., supra* at 15.

Federal Rule of Civil Procedure 54(d)(1) provides,

(d) **Costs; Attorneys' Fees.**

- (1) **Costs Other than Attorneys' Fees.** Except when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs

This Rule creates a heavy presumption in favor of awarding costs to the prevailing party.

Buchanan v. Stanships, Inc., 485 U.S. 265; 268 (1988); *see also, e.g., In re: Paoli Railroad Yard PCB Litigation*, 221 F.3d 449 (3d Cir. 2000).

Section 505 of the Copyright Act provides that a court may in its discretion allow recovery of full costs. 17 U.S.C.A. § 505 (emphasis added). However, because Rule 54(d)(1) creates a strong presumption in favor of awards of costs, the court's discretion lies in whether to award full costs, not in whether to award any costs at all.

C. Analysis

1. **Healthcare Advocates Filed a Frivolous and Objectively Unreasonable Claim for Copyright Infringement**

Although Harding Earley need not establish this to show entitlement to attorneys fees, plaintiff did assert a frivolous copyright infringement claim as were all of its other claims in this action and the underlying action. As in *Lowe*, in this matter, Kevin Flynn, on behalf of Healthcare Advocates, effectively admitted that accessing, printing and using for litigation text and graphics from the archived materials was fair use when he failed to assert in the second amended complaint that providing copies of the materials to the court for *in camera* review was copyright infringement. In addition, plaintiff filed its claim against a background of well-settled law that use of copyrighted materials for litigation does not amount to infringement. *See* NIMMER ON COPYRIGHT, § 13.05[D][2].

Plaintiff pursued legal and factual positions in this matter that render this action objectively unreasonable.² In light of *Nimmer on Copyright* and well-settled law concluding that use of copyrighted materials in litigation does not amount to infringement, plaintiff's legal position never withstood scrutiny. Factually, plaintiff stood behind the untenable and illogical assertion that temporary caching of its copyrighted text and graphics amounted to infringement, without consideration that the typical user cannot control the caching process. In addition, plaintiff never had evidence that Harding Earley provided copies of the printed materials to co-counsel in the underlying matter.

Plaintiff's filing of and determination in pursuing a copyright infringement claim on such

² Although not relevant to the claim for attorneys fees under the Copyright Act, plaintiff's lack of good faith generally is most graphically demonstrated by the fact that it did not withdraw all of the remaining state claims, which forced Harding Earley to file a summary judgment motion with respect to those claims to which plaintiff did not even attempt a response.

flimsy grounds qualifies them as frivolous and objectively unreasonable.

2. Healthcare Advocates Sought to Chastise Harding Earley by Accusing it of Copyright Infringement

A party that files a copyright infringement action without a good faith interest in protecting his copyrights, but who seeks to harm the opposing party financially, does so with an improper motive. *Schiffer Pub., Ltd., supra* at 4 (citation omitted). Here, Healthcare Advocates filed this action in an attempt to take a second bite at the apple. Healthcare Advocates did not offer a colorable claim against Harding Earley in the underlying action, and this court did not allow it to amend its complaint to join Harding Earley. This action represents a second, and again unsuccessful, attempt by Healthcare Advocates to assert an action against Harding Earley. Plaintiff's action does not illustrate a *bona fide* attempt to protect a copyrightable interest, especially in view of the fact that Harding Earley was not a competitor of Healthcare Advocates and did not use the copied works in a competitive manner, but merely copied them as part of its client's defense, thereby preserving relevant evidence, and the fact that the value, if any, of the copied works was not effected by the Harding Earley use.

Plaintiff's filing of this improperly motivated action weighs strongly in favor of an award of attorneys' fees. This court should grant Harding Earley's motion for attorneys' fees.

3. An Award of Attorneys' Fees to Harding Earley Would Compensate It and Deter Actions in Similar Circumstances.

Harding Earley has spent significant time and effort, in addition to financial resources which were rendered on its behalf, to proffer a defense in this groundless action. An award of attorneys' fees would compensate, at least in part, for the resources that were expended on Harding Earley's behalf. In addition, an award would provide notice to potential litigants that

they must hold tenable and logical positions, based on legal and factual premises, in order to avoid judgments for attorneys' fees.

D. Costs

Title 28 section 1920 entitles Harding Earley to costs related to this action. Rule 54(d)(1) creates a strong presumption in favor of taxing costs against Healthcare Advocates. *See Buchanan, supra*. While section 505 of the Copyright Act grants a court discretion in whether to award *full* costs, it does not grant discretion in whether to award costs at all.

Harding Earley has incurred costs related to this action amounting to approximately \$9,348.60, as set forth in Exhibit "B". This court should tax plaintiff in that amount.

III. CONCLUSION

After twice wasting the resources of the Court as well as those of its opponents, it is time for plaintiff "to pay the piper." Accordingly, defendant Harding, Earley, Follmer & Frailey respectfully requests that this Honorable Court enter an order in the form proposed, thereby awarding attorneys' fees to defendant in the amount of \$161,461.50, and costs in the amount of \$9,348.60.

Respectfully submitted,

McKissock & Hoffman, P.C.

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et al,	:	
	:	
Defendants.	:	
	:	

CERTIFICATE OF SERVICE

JEFFREY P. LEWIS, ESQUIRE, attorney for defendants, Harding, Earley, Follmer & Frailey, certifies that a true and correct copy of the foregoing Motion for Attorneys' Fees and Costs has been forwarded to all parties listed below, as indicated, on August 3, 2007 as follows:

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