

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Jeffery R. Werner,
Plaintiff,
v.
Evolve Media, LLC, et al.,
Defendants

2:18-cv-7188-VAP-SKx

**Order GRANTING
Plaintiff’s Motion for
Attorneys’ Fees (Dkt. 71)**

United States District Court
Central District of California

Before the Court is Plaintiff Jeffery Werner’s Motion for Attorneys’ Fees, filed May 12, 2020. (“Motion,” Dkt. 71). After considering all papers filed in support of, and in opposition to, the Motion, the Court deems this matter appropriate for resolution without a hearing pursuant to Local Rule 7-15. The Court hereby GRANTS the Motion.

I. BACKGROUND

On August 16, 2018, Plaintiff Jeffery Werner (“Plaintiff”) filed a Complaint against Defendants Evolve Media, LLC, CraveOnline, LLC, and TotallyHer Media, LLC (together, “Defendants”) for damages and injunctive relief from copyright infringement. (Dkt. 1). After engaging in settlement negotiations, on August 30, 2019, Plaintiff filed a First Amended Complaint, again alleging copyright infringement in violation of 17 U.S.C. § 101 *et seq.* (Dkt. 43, “FAC”). On March 9, 2020, Plaintiff filed a Motion for Summary Judgment, (Dkt. 66), which Defendants did not oppose. The Court granted

1 summary judgment for Plaintiff on April 28, 2020. (Dkt. 69). Plaintiff's
2 Counsel now seek attorneys' fees for prevailing in the action.

3
4 **II. LEGAL STANDARD**

5 "The Copyright Act of 1976 permits the district court to 'award a
6 reasonable attorney's fee to the prevailing party as part of the costs.'" *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1120 (9th Cir. 2007) (quoting
7 17 U.S.C. § 505). Local Rule 54-1 states that the prevailing party is "the
8 party in whose favor judgment is rendered, unless otherwise determined by
9 the Court." L.R. 54-1.

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11
12 "Fees are proper under [§ 505] . . . when either successful
13 prosecution or successful defense of the action furthers the purposes of the
14 Copyright Act." *Perfect 10, Inc.*, 488 F.3d at 1120 (citing *Fantasy, Inc. v.*
15 *Fogerty*, 94 F.3d 553, 558 (9th Cir. 1996) ("[A] successful defense of a
16 copyright infringement action may further the policies of the Copyright Act
17 every bit as much as a successful prosecution of an infringement claim by
18 the holder of a copyright")). Thus, "prevailing defendants as well as
19 prevailing plaintiffs are eligible for such an award, and the standards for
20 evaluating whether an award is proper are the same regardless of which
21 party prevails." *Id.* (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534
22 (1994)).

23
24 The Supreme Court has held that "district courts are to use their
25 discretion in awarding attorney's fees and costs to the prevailing party" in
26 copyright actions. *Fogerty v. Fantasy, Inc.*, 510 U.S. at 523 n.10.

1 Exceptional circumstances are not a prerequisite to a fee award under the
2 Copyright Act, see *Historical Research v. Cabral*, 80 F.3d 377, 378 (9th Cir.
3 1996), nor is culpability on the part of the losing party, see *Fantasy, Inc. v.*
4 *Fogerty*, 94 F.3d at 558. Rather, the district court should consider a series
5 of “nonexclusive factors” when evaluating whether to award fees, including
6 “frivolousness, motivation, objective unreasonableness (both in the factual
7 and in the legal components of the case) and the need in particular
8 circumstances to advance considerations of compensation and deterrence.”
9 *Fogerty v. Fantasy, Inc.*, 510 U.S. at 534 n.19. See also *Wall Data Inc. v.*
10 *Los Angeles Cty. Sheriff’s Dep’t*, 447 F.3d 769, 787 (9th Cir. 2006) (“A
11 district court may consider (but is not limited to) five factors in making an
12 attorneys’ fees determination pursuant to § 505. These factors are (1) the
13 degree of success obtained, (2) frivolousness, (3) motivation, (4)
14 reasonableness of losing party’s legal and factual arguments, and (5) the
15 need to advance considerations of compensation and deterrence,” citing
16 *Smith v. Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996)); *Lamps Plus, Inc. v.*
17 *Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1147 (9th Cir. 2003) (“In
18 exercising its discretion regarding whether it should award attorney’s fees,
19 the district court should weigh[, *inter alia*,] the factors identified in *Fogerty v.*
20 *Fantasy, Inc.*”). The Court addresses these factors in turn.

21 22 III. DISCUSSION

23 A. Discretion to Award Fees

24 As a threshold matter, the Court finds that Plaintiff is the prevailing party
25 in this action and therefore is eligible for an award of attorneys’ fees at the
26 Court’s discretion. *Fogerty v. Fantasy, Inc.*, 510 U.S. A party is a prevailing

1 party for purposes of an attorneys' fee award if it "achieved a material
2 alteration in the legal relationship of the parties that is judicially sanctioned."
3 *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d
4 1027, 1030 (9th Cir. 2009) (internal quotation marks omitted). This Court
5 granted summary judgment to Plaintiff on April 28, 2020, (Dkt. 69), and
6 Plaintiff is, therefore, the prevailing party.

7
8 The Court next addresses the *Fogerty* factors, concluding that an award
9 of attorneys' fees is appropriate. First, Plaintiff has obtained complete
10 success in this matter: the Court granted summary judgment as to each of
11 Plaintiff's claims for copyright infringement and rejected each of Defendants'
12 affirmative defenses. (Dkt. 69). This factor weighs in favor of granting
13 attorneys' fees. The Court likewise finds that Plaintiff's lawsuit is not
14 frivolous. As the Court previously held, his copyrights had in fact been
15 infringed and it was not frivolous for Plaintiff to initiate an action seeking a
16 remedy for that infringement. (*Id.*). The Court further finds Plaintiff's
17 motivations in this action justify an award of attorneys' fees: Plaintiff sought
18 both to receive an award of damages for the infringed copyrights and to
19 enjoin Defendants from continuing to use his copyrighted images. (See
20 *generally* Dkt. 66).

21
22 Next, the Court considers whether Defendants' litigating position was
23 reasonable. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979,
24 1987 (2016) ("A district court that has ruled on the merits of a copyright case
25 can easily assess whether the losing party advanced an unreasonable claim
26 or defense."). Here, Defendant did not advance a litigating position beyond

1 its answer to Plaintiff's complaint, having failed to oppose Plaintiff's Motion
2 for Summary Judgment. In its Answer, however, Defendant raised a
3 number of affirmative defenses that this Court found to be entirely without
4 factual or legal merit. (See Dkt. 68 at 16-21). Defendants argued, for
5 example, that their use of the contested images constituted *de minimis* use,
6 and therefore that Plaintiff's infringement claims failed. (See Dkt. 51 at 7).
7 Yet Defendants had displayed the images, in their entirety, for months,
8 persisting in displaying the images even after having received multiple
9 cease and desist letters from Plaintiff's Counsel. (See Dkt. 63 at 13-15, 27).
10 Defendants advanced other positions in their Answer that were entirely
11 without a legal basis as well. For example, as this Court has previously
12 held, Defendants' ninth affirmative defense, speculative damages fails as a
13 matter of law: because "damages are not an essential element of a
14 copyright infringement claim, . . . speculative damages cannot be an
15 affirmative defense." (Dkt. 68 at 21). Defendants' form pleading, listing nine
16 affirmative defenses divorced from the legal and factual context of this case,
17 are simply not reasonable, and this factor weighs in favor of awarding
18 attorneys' fees.

19
20 Finally, the Court addresses whether an award of attorneys' fees would
21 further the objectives of the Copyright Act. See *Fantasy, Inc. v. Fogerty*, 94
22 F.3d at 558 ("Attorneys' fees are proper when either successful prosecution
23 or successful defense of the action furthers the purposes of the Copyright
24 Act."). The Copyright Act's "primary objective is to 'encourage the
25 production of original literary, artistic, and musical expression for the good of
26 the public.'" *SOFA Ent., Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1280

1 (9th Cir. 2013) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. at 524). Awarding
2 fees to Plaintiff in this case will deter potential infringers from infringing
3 copyrighted work. Thus, compensating Plaintiff would reward artists and
4 others who seek to use the Copyright Act to protect their work, encouraging
5 artists to continue producing original works without fear of having to that
6 work used without their permission. Consequently, the Court finds that
7 awarding fees is consistent with, and will further, the purposes of the
8 Copyright Act.

9 10 **B. Lodestar Crosscheck**

11 Having concluded that an award of attorneys' fees is appropriate, the
12 Court next uses the lodestar method to determine whether the amount of
13 fees sought is reasonable. The lodestar is "calculated by multiplying the
14 number of hours the prevailing party reasonably expended on the litigation
15 by a reasonable hourly rate." *Morales v. City of San Rafael*, 96 F.3d, 359,
16 363 (9th Cir. 1996). "To inform and assist the court in the exercise of its
17 discretion, the burden is on the fee applicant to produce satisfactory
18 evidence—in addition to the attorney's own affidavits—that the requested
19 rates are in line with those prevailing in the community for similar services
20 by lawyers of reasonably comparable skill, experience and reputation."
21 *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) (quoting
22 *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). The "relevant community"
23 for purposes of the "prevailing market rate" is the "forum in which the district
24 court rests." *Id.* at 979.

1 Counsel have provided a Declaration from Attorney Ryan E. Carreon
2 indicating he spent a total of 132.2 hours on this case at an hourly rate of
3 \$380, resulting in approximately \$50,236 in fees. (Dkt. 71-2). The Court
4 finds this hourly rate reasonable for an attorney with Attorney Carreon's
5 experience. (See Dkt. 71-1 at 2-3). Although Counsel did not provide
6 declarations from local attorneys attesting to the reasonableness of the
7 proposed hourly rate, see *Camacho*, 523 F.3d at 980, the Court may "rely[]
8 on [its] own knowledge of customary rates and [its] experience concerning
9 reasonable and proper fees." *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th
10 Cir. 2011). See, e.g., *Wild v. NBC Universal*, No. CV103615 GAF (AJW)x,
11 2011 WL 12877031, at *3 (C.D. Cal. July 18, 2011) (holding "that the hourly
12 rates charged by these attorneys fall within the range of rates charged by
13 similarly situated attorneys in the Los Angeles area" because "[t]he Court
14 has addressed numerous attorneys' fees motions and is thoroughly familiar
15 with billing rates charged by counsel in the local legal market"). The Court
16 is familiar with the hourly rates charged by attorneys in the Los Angeles
17 area and concludes that the requested hourly rate is reasonable.

18
19 The number of hours billed is reasonable as well. Although multiple
20 attorneys worked on the case, Counsel billed only for the primary attorney's
21 time, thus avoiding duplicative billing. (Dkt. 71 at 7). Furthermore, Counsel
22 do not appear to have inflated the time required by the litigation, nor did
23 Counsel bill time for clerical tasks (e.g., drafting a certificate of interested
24 parties) and tasks an experienced litigator should not need to do (e.g.,
25 reviewing federal requirements).

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United States District Court
Central District of California

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C. Costs

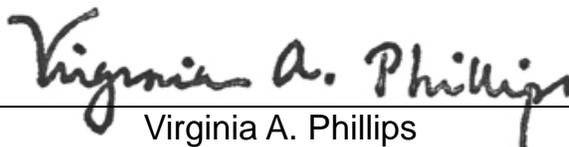
Finally, Counsel seek \$915.03 for litigation costs. After reviewing the detailed breakdown of costs incurred (see Dkt. 71-2 at 8), the Court finds the sum reasonable.

IV. CONCLUSION

The Court, therefore, GRANTS Plaintiff's Motion for Attorneys' Fees.

IT IS SO ORDERED.

Dated: 6/22/20



Virginia A. Phillips
United States District Judge