

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. ERGUN M. CANER	§	
	§	
VS.	§	CIVIL ACTION NO. 4:13-CV-494-Y
	§	
JASON SMATHERS	§	

ORDER GRANTING MOTION FOR ATTORNEY’S FEES IN PART

Before the Court is Defendant’s motion for attorney’s fees (doc.54). After review, the Court GRANTS the motion in part and DENIES it in part.

I. BACKGROUND

The lawsuit underlying this request for attorney’s fees involved a claim of copyright infringement. Plaintiff Dr. Ergun Caner claimed that defendant Jason Smathers infringed on his copyright when Smathers posted two videos featuring Dr. Caner on Viddler.com. On April 17, 2014, this Court entered an order granting Smathers’s motion to dismiss based on its conclusion that his publication of the videos constituted fair use.

In conjunction with his motion to dismiss, Smathers requested attorney’s fees under 17 U.S.C. § 505 of the Copyright Act. The Court instructed Smathers to file a separate motion for fees, which is now before the Court. Smathers seeks an award of \$24,379.80 in attorney’s fees. He claims that he is entitled to an additional \$5,000 in penalties under 28 U.S.C. § 1927 based on the alleged frivolous nature of the lawsuit and on the behavior of Dr. Caner’s attorney throughout the proceedings.

II. LEGAL STANDARD

The Copyright Act authorizes courts to award reasonable attorney's fees to the prevailing party as part of costs. 17 U.S.C. § 505. A party prevails when he obtains "actual relief on the merits of his claim" and where resolution of the claim in his favor "materially alters the legal relationship between the parties by modifying the [losing party's] behavior in a way that directly benefits the [winning party]." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992).

Unlike civil-rights suits, where a prevailing plaintiff is presumptively entitled to an award of attorney's fees and a prevailing defendant is only entitled to such an award if the suit is frivolous, in copyright suits, "prevailing plaintiffs and prevailing defendants are to be treated alike." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994). But an award of attorney's fees to the prevailing party, whether plaintiff or defendant, is not automatic; it is a matter of the Court's discretion. Still, attorney's fees in copyright-infringement cases are "the rule rather than the exception" and should be awarded "routinely." *McGaughey v. Twentieth Century Fox Film Corp.*, 12 F.3d 62, 65 (5th Cir. 1994) (citation omitted).

In exercising its discretion and determining whether attorney's fees are warranted, the Court considers the following non-exclusive factors: "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty*, 510 U.S. at 534 n.19.

If these factors weigh in favor of granting attorney's fees, the Court then evaluates the reasonableness of the fee requested using the lodestar method. "The lodestar is computed by multiplying the number of hours reasonably expended by the prevailing hourly rate in the community for similar work." *In re Fender*, 12 F.3d 480, 487 (5th Cir. 1994) (citation omitted). The Court "then adjusts the lodestar upward or downward depending upon the respective weights of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).¹

III. ANALYSIS

A. Prevailing Party Under Copyright Act

First, the Court must consider whether Smathers qualifies as a prevailing party under § 505. The Fifth Circuit has previously held that a dismissal with prejudice is "tantamount to a judgment on the merits" and confers prevailing-party status. *Schwarz v. Folloder*, 767 F.2d 125, 130 (5th Cir. 1985). This Court dismissed all of Dr. Caner's

¹The twelve *Johnson* factors are:

- (1) time and labor required,
- (2) novelty and difficulty of the issues,
- (3) skill required to perform the legal services properly,
- (4) preclusion of other employment,
- (5) customary fee,
- (6) whether the fee is fixed or contingent,
- (7) time limitations imposed by client or circumstances,
- (8) amount involved and results obtained,
- (9) experience, reputation and ability of the attorneys,
- (10) undesirability of the case,
- (11) nature and length of the professional relationship with the client, and
- (12) award in similar cases.

Johnson, 488 F.2d at 717-19 (abrogated on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87 (1989)).

claims against Smathers with prejudice based on the fair-use doctrine. Thus, Smathers is a prevailing party.

B. *Fogerty* Factors

Next, the Court considers whether to exercise its discretion and award attorney's fees in light of the factors set out by the Supreme Court in *Fogerty*. In support of his argument that Dr. Caner's claims of copyright infringement were frivolous, Smathers points out that Dr. Caner filed the lawsuit months before even applying for copyright protection. And under the Copyright Act, "no civil action for infringement of the copyright in any United States work shall be instituted until registration or preregistration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). Registration or preregistration under § 411(a) is not jurisdictional, but it imposes a type of precondition to suit. *Reed Elsevier*, 559 U.S. at 166.

In his original complaint, filed on June 18, 2013, Dr. Caner alleged that he **owned** the copyright to the videos Smathers posted without permission. (Pl.'s Orig. Compl. at 5.) At the time of Dr. Caner's original complaint, however, he had yet to even file an application to register the copyright. Dr. Caner waited nearly four months to file his applications; he then amended his complaint. The timing of events was not central to the Court's resolution of the motion to dismiss on fair-use grounds, but it is relevant to this Court's consideration of the present motion for attorney's fees because it at least suggests that the action was frivolous.

Dr. Caner explains the delay in seeking copyright protection as follows. He claims that when he became aware that Smathers had posted his presentations on Viddler.com, he filed a "takedown notice" pursuant to the Digital Millennium Copyright Act ("DMCA"). See 17 U.S.C. § 512(c)(3). Smathers filed a counter-notification challenging the removal of the videos. Viddler.com then notified Dr. Caner that the videos would be reposted if he did not file suit within ten to fourteen business days. See 17 U.S.C. § 512(g)(2)(C). Dr. Caner claims that to protect his "perceived copyright interests" he was required to file suit even though he had not filed an application with the Copyright Office. (Pl.'s Resp. at 5.)

The Court finds Dr. Caner's explanation unpersuasive for several reasons. First of all, in his original complaint, Dr. Caner did not claim to be protecting "perceived" rights, he claimed without qualification that he was the "copyright holder." (Pl.'s Orig. Compl. at 5.) Yet he readily admits that at the time he filed his original complaint, he had not even filed an application with the Copyright Office. Dr. Caner claims that the short deadlines under DMCA required that he file his lawsuit first and then "explore[] his legal options" later. This type of behavior, other than being inconsistent with the requirements of Federal Rule of Civil Procedure 11, is not indicative of a meritorious lawsuit.

The Court also concludes that Dr. Caner's copyright claims were objectively unreasonable. The obvious application of the fair-use defense in the case virtually guaranteed that Dr. Caner would not prevail in

this matter. A reasonable person who is represented by competent counsel would not pursue such a claim. The fact that Dr. Caner pressed on with his case, and then conceded the key defense to his claim by failing to even address the application of the fair-use doctrine in his response to Smathers's motion to dismiss, supports an award of attorney's fees.

An award of attorney's fees under these circumstances serves the policies of the Copyright Act by compensating Smathers for having to defend against an unreasonable claim of copyright infringement and deters others who seek to silence criticism in the public forum by improperly invoking the protections of the Copyright Act. At the time that Dr. Caner asserted his purported copyright interests in the video presentations, those materials were being used to criticize Dr. Caner. The timing of Dr. Caner's lawsuit strongly suggests that Dr. Caner was more concerned about insulating himself from criticism than about protecting a valid copyright interest.

C. Loadstar Calculation

Given that the *Fogerty* factors weigh in favor of awarding attorney's fees, the Court must now consider the reasonableness of the fees requested by applying the loadstar method. Smathers requests \$24,379.80 in fees. This amount represents 36.9 hours expended by his attorney, Kelly McClanahan, at a rate of \$393 per hour, plus an additional 41.4 hours spent by McClanahan's law clerk, who bills at a rate of \$175 per hour. Smathers requests an additional \$2,633.10 (\$393 per hour. for 6.7 hours) for the work spent preparing the reply to the motion for attorney's fees.

In analyzing the reasonableness of the fee requested, the Court has the benefit of a companion case in the Western District of Virginia where fees were awarded to Smathers's former co-defendant Jonathan Autry. Dr. Caner alleged that Autry, like Smathers, had posted copyrighted materials to a video-sharing website. Autry moved to sever Dr. Caner's claims against him and transfer the case to the Western District of Virginia, where he resided and where the events giving rise to the claims against him took place. This Court granted the motion to sever and transferred the case.

The transferee court granted Autry's motion for summary judgment concluding, just as this Court did, that using the videos to criticize Dr. Caner was transformative and constituted fair use. *Caner v. Autry*, No. 6:14-CV-004, 2014 WL 2002835, *20-21 (W.D. Va. May 14, 2014). Autry later moved for attorney's fees in the amount of \$34,389.59 as the prevailing party in the copyright action, and the transfer court granted the motion in full. *Caner v. Autry*, No. 6:14-CV-004, 2014 WL 2967607, *1 (W.D. Va. July 1, 2014).

Dr. Caner complains that the fee requested in this case is unreasonable given that the case against Smathers was resolved on a motion to dismiss without a hearing. Further, he suggests that Smathers should have been able to gain certain efficiencies in defending the case given the companion case involving Autry. Finally, he complains of an unspecified financial hardship and asks the Court to reduce the fee given that he "recently moved across the country, started a new

job within this past year, and is supporting his family." (Pl.'s Resp. at 12.)

The fee requested, though, takes all of Dr. Caner's objections into account. First, it is nearly \$10,000 less than the fee awarded in Autry's case, which was resolved on summary judgment and required the parties to prepare for and attend a hearing before the Honorable Norman K. Moon. Second, Smathers's counsel collaborated with Autry's counsel throughout the proceedings and realized certain efficiencies by doing so. In his declaration, Smathers's counsel explains that he did not bill for any work completed by Autry's co-counsel even when it benefitted both defendants. Moreover, Smathers's counsel agreed to represent Smathers at a reduced rate and is seeking fees for only 36.9 hours even though he spent over 50 hours defending the case.

Finally, the Court concludes that Dr. Caner's unspecified financial hardship is not a basis for reducing the fee. Dr. Caner has provided the Court with no competent evidence of financial difficulties. By his own account, Dr. Caner is a best-selling author and is currently employed as a university president. And he hired counsel to represent him in two copyright-infringement cases where he had no expectation of recovering monetary damages.

Based on the forgoing, the Court concludes that the fee requested is reasonable. Although Smathers briefly mentions the *Johnson* factors in his motion for attorney's fees, neither party requests an adjustment of the loadstar based on those factors. This Court's independent consideration of the factors leads the Court to conclude that an

adjustment is not warranted because the relevant factors are adequately reflected in the lodestar amount. See *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (explaining that many of the *Johnson* factors are "presumably fully reflected in the lodestar amount").

D. § 1927 Penalties

According to Smathers, Dr. Caner's counsel "unreasonably and vexatiously multiplied the proceedings by consistently indicating opposition to motions and then conceding them at the last minute" or failing to respond at all. (Def.'s Mot. at 1.) Accordingly, Smathers requests a \$5,000 penalty under 28 U.S.C. § 1927. Under that section, "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Counsel's habit of opposing motions, which forced Smather's counsel to file a full brief, and then conceding them at the last minute, undoubtedly vexed Smathers and his attorney. Nonetheless, the Court cannot say that this conduct warrants sanctions. Indeed, the Fifth Circuit has held that sanctions under § 1927 are inappropriate absent "evidence of recklessness, bad faith, or improper motive." *Hogue v. Royse City*, 939 F.2d 1249, 1256 (5th Cir. 1991) (citing *Manax v. McNamara*, 842 F.2d 808, 814 (5th Cir. 1988)). Smathers has not alleged

conduct of such magnitude.² Accordingly, the Court declines to award penalties under § 1927.

IV. CONCLUSION

Based on the forgoing, the Court GRANTS Smathers's motion for attorney's fees and awards fees of \$24,379.80. His motion for penalties under § 1927 is DENIED.

SIGNED October 15, 2014.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

²It should also be noted that Smathers's counsel prolonged the proceedings by failing to follow this Court's local rules. Counsel's failure to abide by the rules resulted in several deficiency orders and wasted judicial resources. Further, Smathers's counsel filed the present motion for attorney's fees late and had to seek leave to file the motion out of time.