

No. _____

In The
Supreme Court of the United States

—◆—
LEO PELIZZO,

Petitioner,

v.

MALIBU MEDIA, LLC,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

In *Fogerty v. Fantasy*, 510 U.S. 517 (1994), this Court agreed that judges could rely on several non-exhaustive factors to guide their equitable discretion in awarding prevailing party fees under the Copyright Act, 17 U.S.C. §505, including “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.” The Court set two parameters around this discretionary authority: the factors used to guide this discretion must be “faithful to the purposes of the Copyright Act and . . . applied to prevailing plaintiffs and defendants in an evenhanded manner.”

The Court of Appeals has adopted a bright-line rule indicating that considerations of compensation and deterrence in deciding whether to award fees under §505 are “inextricably intertwined” with the reasonableness and frivolity of a plaintiff’s claims.

1. DO CIRCUIT COURTS HAVE THE FREEDOM TO LIMIT THE “CONSIDERATIONS OF COMPENSATION AND DETERRENCE” THAT 17 U.S.C. §505 AWARDS MAY BE USED TO ADVANCE IN THEIR CIRCUIT?

In exercising its discretion in this case, the district court decided to bifurcate its consideration of the evidentiary record between two statutes, namely, 17 U.S.C. §505 and 28 U.S.C. §1927. In assessing

QUESTIONS PRESENTED – Continued

“frivolousness, motivation, and objective unreasonableness,” it discounted any portions of the record considered in imposing sanctions under §1927. On appeal, the Eleventh Circuit narrowly limited its review within the contours chosen by the district court and found no abuse of discretion in the determination that “Malibu, *up to a point*, acted in an objectively reasonable manner.”

- 2. WHETHER A COURT OF APPEALS MUST CONSIDER THE TOTALITY-OF-THE-CIRCUMSTANCES AND REVIEW ALL ASPECTS OF A TRIAL COURT’S DECISION TO ENSURE THAT ITS CONSIDERATIONS ARE EVEN-HANDED AND FAITHFUL TO THE PURPOSES OF THE COPYRIGHT ACT.**

PARTIES TO THE PROCEEDING

Respondent, Malibu Media, LLC, is an adult film provider recognized as the most litigious copyright plaintiff in the United States today.

Petitioner, Leo Pelizzo, was sued for copyright infringement after being mistakenly linked to a series of infringing activities through a flawed Internet Protocol (IP) investigation.

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OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's opinion (App. 1), which affirmed the District Court's denial of Petitioner's 17 U.S.C. §505 fee petition for fees, was handed down on March 26, 2015, and is reported at 604 F. App'x 879 (11th Cir. 2015). The order denying the Petition for Rehearing *en Banc* (App. 37) was entered on June 4, 2015, and is unreported. The United States District Court for the Southern District of Florida's (App. 7) order, which adopted the Magistrate's Report and Recommendation (App. 16) in its entirety, was entered on March 28, 2014 and is unreported.



STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment in this case on March 26, 2015 and, on June 4, 2015, denied a petition for rehearing *en Banc*. This Court has jurisdiction over the judgment pursuant to 28 U.S.C. §1254(1).



STATUTORY PROVISION INVOLVED

The Copyright Act, 17 U.S.C. §505, provides that:

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.



STATEMENT OF THE CASE

Statutory Background

The issue raised in this Petition concerns the standard governing prevailing party fee awards under 17 U.S.C. §505 of the Copyright Act. *Fogerty* resolved a split amongst circuit courts regarding the proper interpretation of §505. In doing so, the Court explained that “[t]here is no precise rule or formula for making [§505] determinations, but instead equitable discretion should be exercised” in making these determinations. *Fogerty v. Fantasy*, 510 U.S. 517, 534 (1994) (internal citation omitted). While agreeing that various non-exclusive factors could be used to guide these determinations, the Court set two parameters around this discretionary authority: the framework used to guide the determination must be (1) faithful to the purposes of the Copyright Act; and (2) applied to prevailing plaintiffs and defendants “in an even-handed manner.” *Id.* at 534-35.

In the two decades since *Fogerty*, the judicial landscape is once again divided. Part of the problem is rooted in the fact that courts have latched on to the “non-exclusive” factors approved of by the Court, rather than the underlying principle that “equitable discretion should be exercised ‘in light of

the considerations we have identified.” Some commentators suggest this is due to the ambiguity surrounding the considerations “identified.” See 5 Nimmer on Copyright §14.10[2][b] (2015) (noting the phrase sheds little light and “comes in a context in which that light has been filtered out from its source”). Thus, rather than exercising their discretion equitably, most courts have treated “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” as a fixed rule. The result has led to inconsistent and poorly reasoned decisions reciting the same factors and rhetoric verbatim and then applying the law to contrary effect.

Over a decade ago, the Seventh Circuit carved out its own path after deeming the *Fogerty* factors “non-exclusive arguably dictum, and in need of simplification.” See *Assessment Technologies v. Wiredata, Inc.*, 361 F.3d 434 (7th Cir. 2004). Accordingly, in the Seventh Circuit, the inquiry centers around the strength of the prevailing party’s case and the amount of damages the prevailing party obtained. See *Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 791 (7th Cir. 2014). This lack of clarity has now led the Eleventh Circuit to create its own refinement of the *Fogerty* factors to contrary effect, which limits “considerations of compensation and deterrence” around the reasonableness and frivolity of a plaintiff’s claims. Absent further guidance from the Supreme Court, these diverging interpretations regarding the

standard used to award fees under §505 will not only linger, but continue to grow.

The issues in these particular circumstances have significant implications for the future of copyright litigation in the United States. Since January 2009, Malibu Media has filed 4,332 lawsuits, all of which rest on the same legal allegations and technological basis asserted against Pelizzo. *See* Jeff Stone, *Copyright Owner Malibu Media Is Most Litigious Plaintiff In The US*, International Business Times (Aug. 14, 2015), <http://www.ibtimes.com/dont-download-x-art-porn-torrents-copyright-owner-malibu-media-most-litigious-2054499>. The fact this case is one of thousands brought by the same plaintiff using tactics that will inevitably sweep up other innocent parties makes it an ideal vehicle for addressing and resolving an important question. Due to these developments, §505's ability to function effectively as an equitable stopgap is a matter of critical importance that desperately calls for clarification.

Factual Background

Under the Federal rules, a copyright plaintiff seeking to identify an anonymous internet user may proceed by filing a complaint against an anonymous "John Doe" and, thereafter, seeking permission to serve a subpoena on the Internet Service Provider.¹

¹ Fed. R. Civ. P. 26(d)(1).

This case, however, began in county court. On February 15, 2012, Malibu Media obtained a bill of discovery order from a Miami-Dade county judge compelling various internet service providers to identify 347 anonymous internet users [DE#13-1]. It was, thereafter, provided with Pelizzo's name, email address, mailing address, and phone number. Malibu waited nearly six (6) months before filing a federal complaint. In that time, it declined to send any written communications to Pelizzo advising him of the claims; but, instead, used the time to continue tracking the on-going infringement linked to the IP address in question. On July 27, 2012, Malibu Media filed a complaint in the Southern District of Florida alleging that Pelizzo had infringed fourteen (14) films.² The Complaint asserted that "Defendant is the only person who can be identified as the infringer at this time." [DE#1, ¶24].

On August 20, 2012, Pelizzo received his first notice of the claims when he was served with the complaint. Upon learning of the suit, he contacted his internet service provider to determine the IP address assigned to his account. [DE#7-1, p. 9-11]. Pursuant to the internet service provider's instructions, he used an online tool, "www.whatismyip.com," to identify the IP address currently associated with his internet account. *Id.* This investigation confirmed that his account was *not* assigned to the IP address referenced

² [DE#1].

in Plaintiff's complaint. *Id.* Pelizzo filed a motion to dismiss, which was accompanied by (1) documents showing the results of this IP investigation; and (2) passport and visa documentation showing he had been in South America when the infringement occurred. [DE#7-1]. Malibu Media opposed the motion.

The district court determined these factual matters were not cognizable at the motion to dismiss stage; but, "might pave the way for an early summary judgment motion" or a "Rule 11 motion, depending on the circumstances." *Malibu Media, LLC v. Pelizzo*, 2012 U.S. Dist. LEXIS 180980, 11, n.5 (S.D. Fla. Dec. 20, 2012). The factual background set forth in the Order denying the motion to dismiss was "derived from Plaintiff's Complaint and the exhibits accompanying it, as the Court must accept all factual allegations as true and construe them in the light most favorable to the Plaintiff." *Id.* 1-2, n.1. The litigation proceeded for another seven months. In that time, Malibu Media never requested a second subpoena. Instead, following a series of delays, Malibu deposed Pelizzo's Internet Service Provider pursuant to Rule 30(b)(6) "(a) to ascertain if and how the correlation error occurred; and (b) to determine if it would be possible to identify the infringer." [DE#47-6, at ¶9.]

After finally conceding Pelizzo had been misidentified, Malibu Media indicated it would be willing to voluntarily dismiss the action if Pelizzo would agree to a mutual release requiring him to bear his own fees and expenses. When Pelizzo declined to absorb these costs, Malibu Media threatened to bankrupt

him and ramped up its litigation efforts. Following a mediation and fruitless negotiations, Malibu eventually dismissed its action with prejudice over a month later.

Following dismissal, Pelizzo moved for prevailing-party fees under the Copyright Act, 17 U.S.C. §505, and vexatious-litigation fees under 28 U.S.C. §1927. The magistrate judge issued a report recommending that sanctions be entered against Malibu's counsel under §1927 in the amount of \$6,815.50; but denying Pelizzo's prevailing-party fee request under the Copyright Act. (App. 16). In assessing 17 U.S.C. §505, the magistrate judge discounted any portions of the record already evaluated under its §1927 analysis. (App. 28). The court also based its finding on the factual background set forth in the district court's motion to dismiss which, in turn, had been based on Malibu Media's pleading. Following the approach taken by other courts in the Southern District of Florida, the consideration driving the §505 analysis focused solely on whether the plaintiff's claims were reasonable or frivolous. (App. 29). The discussion of each *Fogerty* factor centered on Pelizzo's failure to meet an evidentiary burden. For instance, the district court noted that "Defendant cites no authority for the proposition that the pursuit of this lawsuit became objectively unreasonable the moment Defendant came forward with potentially exculpatory evidence" (App. 27) and "Defendant has not done anything to disprove Plaintiff's stated motivation for filing suit." (App. 24). The district court declined to consider

evidence regarding Malibu Media’s practices in other cases, stating that, “Defendant’s reliance on and citation to acts and practices in other unrelated cases does not aid the Court’s analysis here.” (App. 24, n.3). The court also declined to consider the effects of Malibu’s delays or circumvention of Federal procedure. As the court put it, “[t]he Plaintiff need not avail itself of every form of communication, telephone, electronic mail, certified mail and others, to be regarded as having attempted a pre-suit resolution of the dispute.” (App. 11). The district court ultimately held the factors weighed against a prevailing party award despite the “debateable social value” of Malibu Media’s works. (App. 12).

The Court of Appeals affirmed, noting that: “[a]s for considerations of compensation and deterrence, we evaluate those factors as ‘inextricably intertwined’ with the reasonableness and frivolity of Malibu’s claims.” (App. 5). The scope of appellate review was confined to the same discrete window chosen by the district court. In doing so, the Eleventh Circuit found “no abuse of discretion in the district court’s conclusion that Malibu, up to a point, acted in an objectively reasonable manner We say ‘up to a point’ because the district court evaluated Malibu’s liability for vexatious-litigation fees under 28 U.S.C. §1927 beginning after the ‘knee-jerk’ email sent by Malibu’s counsel.” The opinion included no independent citations to or discussions of the factual record.



REASONS FOR GRANTING THE WRIT

Legal discretion is defined as the “privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of the law.”³ The role of a judge exercising their equitable discretion is akin to a tailor working with a large piece of fabric that must be hemmed to fit the shape and proportions of the job required. Rather than letting judges exercise their discretion in tailoring this relief, the Court of Appeals has lopped off a small patch of fabric defining the contours of judicial discretion. As with a tailor running short on cloth, the relief fashioned by these judges promises to be ill-fitting. This Court recently acknowledged the important – and distinct – equitable role played by restitutional remedies, such as Section 505. *See Petrella v. MGM*, 134 S. Ct. 1962, 1967 (2014) (noting that a plaintiff’s “delay in commencing suit [is] a factor in determining the contours of relief” at the remedial stage.). The policy decisions shaping the future of the Copyright Act must be rooted in principles that are permanent and timeless, rather than a function of passing trends or procedural maneuvers. When the consequences of these delays are unfair, these “discrete wrongs” should be brought to bear in determining appropriate relief under Section 505. *See id.* at 986, n.1. Moreover, this Court has recently lent

³ BLACK’S LAW DICTIONARY 467 (6th ed. 1991).

clarity to the Patent Act's analogous prevailing party provision by clarifying that an appellate court should review *all* aspects of a district court's §285 determination for abuse of discretion, *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1749 (2014), and that trial courts should award fees based on a "case-by-case exercise of their discretion, considering the totality of the circumstances." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). To ensure that §505's objectives are achieved, a similar clarification is needed here.

I. THE ELEVENTH CIRCUIT'S NARROW CONSTRUCTION OF 17 U.S.C. §505 INTRUDES ON CONGRESSIONAL AUTHORITY AND INHIBITS TRIAL COURTS FROM EXERCISING THEIR EQUITABLE DISCRETION IN THE MANNER NEEDED TO ACHIEVE THE STATUTE'S LEGISLATIVE OBJECTIVES

A. The Bright-Line Rule Adopted Renders §505 Superfluous.

American courts have long followed a general rule requiring parties to litigation to pay their own lawyers, win or lose, unless a statute or contract provides otherwise. Under this default rule, a prevailing defendant is always out of pocket for its fees. In addition to failing to provide a prevailing litigant complete justice, the financial burdens imposed under this default rule may discourage (or make it impossible for) litigants with a meritorious claim or defense

to vindicate their rights. Due to the important policy considerations at stake in copyright law, Congress has counteracted these imbalances by creating a statutory fee award to ensure litigants with meritorious claims or defenses are not deprived of access to the courts.

Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith in bringing the action . . . if that had been the intent of Congress, no statutory provision would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith.

Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 419 (1978).

Under this framework, copyright claims will be encouraged and frivolous lawsuits will be discouraged. However, the Copyright Act *already* compensates copyright owners that pursue meritorious claims by allowing them to recover actual damages or statutory damages. Similarly, frivolous and vexatious behavior is already deterred by other rules. This directly conflicts with the guiding principles recently discussed in *Octane Fitness*, which rejected an inflexible framework that would render the prevailing patent fee statute largely superfluous by focusing on behavior already addressed by other rules. *Octane*

Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1758 (2014); *United States v. Jicarilla Apache Nation*, 564 U.S. ___, ___, 131 S. Ct. 2313, 180 L. Ed. 2d 187, 207 (2011) (“As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law”) (quoting *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988)).

The Supreme Court has consistently held that provisions promulgated by Congress and Federal regulatory agencies require a “contextual inquiry” and “cannot be reduced to a bright-line rule.” *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (the 17 U.S.C. §107 analysis cannot “be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”). Last year, this Court reiterated this principle in unanimously rejecting a Federal Circuit rule requiring defendants seeking a prevailing fee award under the Patent Act⁴ to establish that “the litigation [was] both brought in subjective bad faith and objectively baseless.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), *abrogating Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378 (Fed. Cir. 2005).

⁴ 35 U.S.C. §285 provides that a “court in exceptional cases may award reasonable attorney fees to the prevailing party.”

Moreover, while judges have been given various tools to manage litigation, they do not have unbridled authority to decide how these are used. The only statutory precondition to a §505 award is a requirement that the party receiving the fee be the ‘prevailing party’ and that the fee be reasonable. Neither the meaning of “equitable relief” nor the Copyright Act’s objectives fluctuate from circuit to circuit. This Court has previously observed that “courts are not free to fashion drastic new rules with respect to the allowance of attorneys’ fees to the prevailing party [based] upon the courts’ assessment of the importance of the public policies involved in particular cases.” *See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269 (1975).

B. The Rule Disrupts the Coherence of the Copyright Act by Preventing §505 From Functioning as an Equitable Remedy.

“Legal systems contain doctrines that help courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances.” *Petrella v. MGM*, 134 S. Ct. 1962, 1979 (2014) (Breyer, J., dissenting). The relief authorized under Section 505 falls within this equitable domain. *See id.* at 1967, n.1. Rather than allowing sharply defined rules and procedural advantages to dictate the outcome of these decisions, judges must be free to rely on their common-sense and innate sense of justice. In *Octane*, this court clarified that civil

litigants are required to establish facts by a preponderance of the evidence unless Congress says otherwise. In cases involving questions of policy and equity, this is particularly important to ensure that “both parties to ‘share the risk of error in roughly equal fashion,’” *Octane*, 134 S. Ct. at 1758 (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)). These determinations should be based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence. This is consistent with principles of equity, which provide that “in the absence of relations or conditions requiring a different result, equity will treat all members of a class as on an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences.” C.J.S., *Equity*, p. 517, §109.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO GIVE FRESH, EVEN-HANDED CONSIDERATION TO THE TOTALITY-OF-THE-CIRCUMSTANCES

Rather than weighing totality-of-the-circumstances, the district court bifurcated the record between two statutes, applying §505 solely to the portion of the litigation immediately preceding the evidence of bad faith. The Court of Appeals narrowly limited the scope of its appellate review within the confines chosen by the district court and satisfied itself with a finding that “Malibu, up to a point, acted in an

objectively reasonable manner We say ‘up to a point’ because the district court evaluated Malibu’s liability for vexatious-litigation fees under 28 U.S.C. §1927 beginning after the ‘knee-jerk’ email sent by Malibu’s counsel.” (App. 5). Petitioner challenged both the district court’s legal application of the *Fogerty* standard and its incomplete assessment of the factual record. The court limited its consideration “time period where Plaintiff threatened continued litigation of this matter is *more properly addressed* under the 28 U.S.C. §1927 analysis.” (App. 105, n.5). A court must decide whether an award is merited and, if so, how much should be awarded. These are two separate inquiries involving distinct considerations. Moreover, “[u]nder the Copyright Act, the question is whether a successful defense of the action furthered the purposes of the Act, not whether a fee award would do so.” *Mattel, Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003). “The district court appears to have decided that the fee award itself would not further the purposes of the act. Instead of denying fees outright, the court should have reduced the amount of the requested fee, if appropriate.” *Id.* The district court’s conclusion regarding the interplay between Section 1927 and Section 505 was accepted without review.

This Court recently held that “an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court’s §285 determination.” *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1749 (2014). In this case

the contours of appellate discretion were dictated by the district court's own interpretation of the record. Under this standard, a decision is insulated from any meaningful appellate review so long as the district court correctly stated the legal standard or criteria. Consequently, a rigid interpretation that is inconsistent with the Copyright Act's objectives is rendered virtually unreviewable on appeal.

III. THIS COURT'S GUIDANCE IS NEEDED TO RESOLVE THE UNCERTAINTY AND INCONSISTENCY SURROUNDING PREVAILING FEE AWARDS UNDER 17 U.S.C. §505 OF THE COPYRIGHT ACT

"A presumption is a deduction which the law expressly directs to be made from particular facts." 21B CHARLES A. WRIGHT ET AL., FED. PRAC. & PROC. EVID. §5124 (2d ed. 2012). In the Eleventh Circuit the basic fact is that a plaintiff is the prevailing party in a copyright case, the presumed fact is that the plaintiff is entitled to a fee award. In this case, Pelizzo was unable to recover an award despite his actual innocence. By contrast, Malibu Media routinely obtains Section 505 awards following the entry of a default judgment against defendants whose substantive guilt (let alone motivations) are unknown. *See, e.g., Malibu Media, LLC v. Danford*, 2015 U.S. Dist. LEXIS 62022 (M.D. Fla. May 12, 2015) ("Since the Copyright Act seeks to stimulate artistic creativity for the general public good and discourage infringement, awarding attorney's fees addresses these goals In light of Danford's failure

to participate in this litigation, the Court finds awarding attorney’s fees is appropriate in this circumstance.”)⁵ Rather than relying on logic and an intuitive sense of justice, a judge’s role in this process is reduced to reinforcing procedural advantages lacking any relation to the Copyright Act’s objectives or substance of a claim. This holds a defendant hostage to procedure while, counterintuitively, rewarding plaintiffs whose tactical maneuvers have created and kept these residual informational asymmetries and ambiguities in place.

The burdens allocated under the Court of Appeal’s framework are directly at odds with the presumptions conferred in other courts of appeals. In the Fifth Circuit, prevailing party awards under the Copyright Act are “the rule rather than the exception and should be awarded routinely.” *See, e.g., Macro Niche Software, Inc. v. Imaging Solutions of Austl.*, 603 F. App’x 351, 353 (5th Cir. 2015) (quoting *Virgin Records Am. Inc. v. Thompson*, 512 F.3d 724 (5th Cir. 2008)). While the presumptive entitlement afforded to prevailing parties pre-dates *Fogerty*, the Fifth Circuit later harmonized the rule with the Supreme Court’s opinion by reasoning that it does not inhibit judicial discretion. *See Hogan Sys., Inc. v. Cybresource Int’l, Inc.*, 158 F.3d 319, 325 (5th Cir. 1998) (“The language

⁵ *See also Malibu Media, LLC v. Griggs*, 2015 U.S. Dist. LEXIS 79904 (S.D. Ohio June 19, 2015) (granting prevailing party fees following default); *Malibu Media, LLC v. Caswell*, 2015 U.S. Dist. LEXIS 79922 (S.D. Ohio June 19, 2015) (same).

of *Fogerty* clearly allows for judicial discretion in determining whether attorney’s fees should be awarded. So does the *McGaughey* rule.”).

In 2002, the Seventh Circuit concluded the *Fogerty* factors were “nonexclusive, arguably dictum, and in need of simplification” *Assessment Technologies v. Wiredata, Inc.*, 361 F.3d 434 (7th Cir. 2004) (citing *Gonzales v. Transfer Technologies, Inc.*, 301 F.3d 608 (7th Cir. 2002)). Rather than the frivolousness and reasonableness of a plaintiff’s claims, however, the Seventh Circuit has carved out two different overriding considerations: the strength of the *prevailing* party’s case and the amount of damages the prevailing party obtained. *See Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 791 (7th Cir. 2014). Accordingly, where a plaintiff prevails “the smaller the damages . . . the stronger the case for an award of attorney’s fees.” *Gonzales v. Transfer Technologies, Inc.*, 301 F.3d 608 (7th Cir. 2002). Since defendants receive no award, the Seventh Circuit has created a “very strong presumption” favoring a fee award when a copyright defendant prevails. *See Woodhaven Homes v. Hotz*, 396 F.3d 822 (7th Cir. 2005). In the Seventh Circuit’s words, this “very strong presumption . . . is designed to ensure that an infringement defendant does not abandon a meritorious defense in situations in which ‘the cost of vindication exceeds the private benefit to the party.’” *DeliverMed Holdings, LLC v. Schaltenbrand*, 734 F.3d 616, 625-26 (7th Cir. 2013). This has become an entrenched rule warranting reversal on appeal. *See, e.g., Mostly*

Memories, Inc. v. For Your Ease Only, Inc., 526 F.3d 1093, 1095 (7th Cir. 2008) (“The district court’s summary ruling reflects no consideration of these principles.”); *Riviera Distributors, Inc. v. Jones*, 517 F.3d 926, 929 (7th Cir. 2008); *Eagle Services Corp. v. H2O Industrial Services, Inc.*, 532 F.3d 620, 625 (7th Cir. 2008). One district court acknowledged the influence of this presumption as follows:

While [defendant] is correct that an award of fees remains discretionary, she fails to apprehend the strength of the current presumption in this Circuit that prevailing Defendants are entitled to an award of fees. She cites cases from the Ninth, Fifth, Second, First, and Sixth Circuits [however] this is a hierarchical system, and this Court is bound by the controlling precedent of the Seventh Circuit.

Bosch v. Ball-Kell, 2007 U.S. Dist. LEXIS 79207 at *13-14 (C.D. Ill. 2007) (“finding that under the current state of the law in the Seventh Circuit, Defendants are entitled to an award of fees.”).

At least two circuits, the Courts of Appeals for the Second Circuit and the Ninth Circuit, have acknowledged and expressly declined to adopt the Seventh Circuit’s “presumption.” *Lava Records, LLC v. Amurao*, 354 F. App’x 461, 463 (2d Cir. 2009); *Marshall & Swift/Boeckh, LLC v. Dewberry & Davis LLC*, 586 F. App’x 448, 449-50 (9th Cir. Cal. 2014) (“Unlike the Seventh Circuit, we have continued to apply the factors outlined in *Fogerty* without a presumption.”).

One district court has suggested that the Seventh Circuit’s “refinement of the Fogerty standard . . . appears to conflict with the Supreme Court’s holding in *Fogerty*.” *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 820 F. Supp. 2d 569, 575 (S.D.N.Y. 2011); *see also Klein & Heuchan, Inc. v. Costar Realty Info., Inc.*, 2011 U.S. Dist. LEXIS 141246, 16-17 (M.D. Fla. Dec. 7, 2011) (noting that “the 7th Circuit presumption in favor of awarding fees to a prevailing defendant is non-binding authority.”); *ZilYen, Inc. v. Rubber Mfrs. Ass’n*, 958 F. Supp. 2d 215, 219 (D.D.C. 2013) (“While the considerations underlying the presumptive entitlement set forth by the Seventh Circuit are certainly relevant to a court’s consideration of the appropriateness of a fee award under §505, the Court declines to adopt the presumption employed in the Seventh Circuit.”). That is certainly true of the standard employed here.

◆

CONCLUSION

While the technical process used to track internet infringers may be complex, the issues pertaining to copyright law are not. Upon learning of the claim, Pelizzo provided the district court and Malibu Media with the documentary evidence needed to settle this point and draw the litigation to a close. It was Malibu Media’s delays, and its circumvention of federal procedures, that cornered Pelizzo in the litigation for another seven months. But for his defense, many of the ambiguities and flaws of Malibu Media’s model would remain in the dark. Vigorously litigated

disputes are necessary to develop legal doctrine. As Benjamin Cardozo observed: “[t]he sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped.”⁶ For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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⁶ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 35 (Yale 1921).

App. 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-11795
Non-Argument Calendar

D.C. Docket No. 1:12-cv-22768-PAS

MALIBU MEDIA, LLC,

Plaintiff-Appellee,

versus

LEO PELIZZO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(March 26, 2015)

Before JULIE CARNES, FAY, and COX, Circuit
Judges.

PER CURIAM:

This is an attorney's fees dispute arising out of copyright infringement litigation. The underlying case ended when the district court dismissed with prejudice the infringement claims that the Plaintiff, Malibu Media, LLC ("Malibu"), asserted against the Defendant, Leo Pelizzo ("Pelizzo"). (DE40). Pelizzo

moved for prevailing-party fees under the Copyright Act, 17 U.S.C. § 505, and vexatious-litigation fees under 28 U.S.C. § 1927. The magistrate judge issued a report and recommendation, recommending that Pelizzo receive fees and costs in the amount of \$6,815.50 under Section 1927, but no prevailing-party fees under the Copyright Act. (DE53). Pelizzo timely filed objections with the district court. After considering and overruling each of Pelizzo's objections, the district judge adopted the report and recommendation without change. (DE58). Pelizzo appeals, challenging only the district court's failure to award him prevailing-party fees under the Copyright Act. We have jurisdiction and we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

As necessary to resolve this appeal, the facts and procedural background can be summarized briefly. Malibu claimed in a Complaint filed on July 27, 2012, and served on Pelizzo on September 5, 2012, that Pelizzo was infringing Malibu's copyright to a number of films by repeatedly downloading them through an internet protocol address. The address was allegedly assigned to Pelizzo by Hotwire Communications, the internet service provider to a 700-unit condominium complex in which Pelizzo owned a unit. The unit was not his residence. Pelizzo denied the facts giving rise to the claim. After a March 13, 2013, Rule 30(b)(6) deposition of Hotwire, Malibu was persuaded that its allegations probably could not be proved and offered to dismiss the lawsuit with prejudice.

Pelizzo's counsel responded that it would agree to a dismissal, but only if Malibu paid the \$17,500 in attorney's fees his client had incurred. Malibu's counsel responded with what he admits was a "knee-jerk" e-mail promising to continue the case against Pelizzo. By copy of the e-mail, Malibu's counsel directed his paralegal to prepare written discovery, which was immediately served on Pelizzo and was later withdrawn. Malibu also asked for dates for Pelizzo's deposition.

At an April 4, 2013, mediation, the only issue negotiated was fees owed Pelizzo. Malibu again informed Pelizzo's counsel that it would be dismissing the case. On April 11, Malibu offered to pay Pelizzo \$13,000 for his attorney's fees. Pelizzo's counsel rejected the offer because, according to him, fees incurred by his client now were at \$24,000, rather than the \$17,500 figure following the March Hotwire deposition. Malibu moved to dismiss with prejudice anyway, and the district court granted the motion on June 4, reserving Pelizzo's right to seek attorney's fees and costs.

II. CONTENTIONS OF THE PARTIES AND STANDARD OF REVIEW

Pelizzo contends that the district court improperly failed to award him fees as a prevailing party

under the Copyright Act, 17 U.S.C. § 505.¹ This statute authorizes an award of attorney's fees to a prevailing party. The amount of fees is determined in the court's discretion and in accordance with the "Fogerty factors." See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023 (1994). We review the district court's award for an abuse of discretion, *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 198 F.3d 840, 842 (11th Cir. 1999), and reverse only if the district court has made a "clear error in judgment." *McMahan v. Toto*, 256 F.3d 1120, 1129 (11th Cir. 2001).

III. DISCUSSION

We find no abuse of discretion in the district court's conclusion under Section 505 and *Fogerty* that Malibu's subjective motivation for filing suit was not improper or that the suit was not frivolous, the first two *Fogerty* factors. To whomever the subject IP address was subscribed, it is undisputed that a genuinely phenomenal number of films was being downloaded using it. Malibu tried to contact Pelizzo before filing suit, offered to run the problem to ground informally before instituting extensive discovery, and never made a monetary demand upon him. Because of the nature of the films, Pelizzo justly was ashamed to be a part of the litigation, but the magistrate judge

¹ Pelizzo contends that the district court based its Copyright Act fee denial on clearly erroneous findings of fact. We have reviewed the record and find this contention to be without merit.

found no record evidence that Malibu sued him for that reason, and Pelizzo has not presented any such evidence. Using detection methods it had used hundreds of times before, Malibu determined that the IP address apparently assigned to Pelizzo was the vehicle for the infringements and acted accordingly.

We also find no abuse of discretion in the district court's conclusion that Malibu, up to a point, acted in an objectively reasonable manner and in a manner that served the purposes of the Copyright Act: compensation and deterrence.² Contrary to Pelizzo's assertion, Malibu could not have been expected simply to take his word for the fact that he had not infringed Malibu's copyrights, given the substantial evidence implicating Pelizzo.

As for considerations of compensation and deterrence, we evaluate those factors as "inextricably intertwined" with the reasonableness and frivolity of Malibu's claims. If Malibu's claims were properly brought and properly maintained, then they properly served the purposes of the Copyright Act.

² We say "up to a point" because the district court evaluated Malibu's liability for vexatious-litigation fees under 28 U.S.C. § 1927 beginning after the "knee-jerk" email sent by Malibu's counsel.

IV. CONCLUSION

We find no abuse of discretion in the district court's decision to deny Pelizzo prevailing-party Copyright Act attorney's fees.

AFFIRMED.³

³ We deny Malibu's motion for attorney's fees filed in this court under Fed. R. App. P. 38 and 28 U.S.C. § 1927 for having to defend Pelizzo's appeal. While we affirm the district court's order denying Pelizzo's request for prevailing-party fees under the Copyright Act, his appeal is not frivolous.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 12-22768-CIV-SEITZ/SIMONTON

MALIBU MEDIA, LLC,

Plaintiff,

v.

LEO PELIZZO

Defendant.

**ORDER OVERRULING DEFENDANT'S
OBJECTIONS, ADOPTING MAGISTRATE'S
REPORT AND RECOMMENDATION,
AND CLOSING CASE**

THIS MATTER is before the Court upon Defendant's Objections PE 54] to the Report and Recommendation (R & R) issued by the Honorable Andrea Simonton [DE 53]. In the R & R, Magistrate Judge Simonton recommends granting in part and denying in part Defendant's Motion for Attorney's Fees and Costs [DE 41]. As to the Defendant's claim of right to attorney's fees and costs under the Copyright Act, the R & R concludes that the Defendant is not entitled to recover. [DE 53]. However, with regard to the Defendant's claim of right to attorney's fees and costs pursuant to 28 U.S.C. § 1927, the R & R recommends that Defendant is entitled to recover a partial award. *Id.*

Defendant's objections suggest that the R & R erred in failing to consider certain facts which pertain to the Magistrate's resolution of two of the four *Fogerty*¹ factors used in determining whether Defendant is entitled to attorney's fees and costs pursuant to the Copyright Act. Four of the six objections concern "motivation" while two of the six concern "frivolousness." *Id.* After having reviewed, *de novo*, Magistrate Judge Simonton's R & R, the record, and the Objections, the Court finds that the Magistrate Judge's findings of fact are not clearly erroneous and that the Magistrate Judge has correctly applied the law to the facts. Therefore, the Objections are overruled and the Magistrate Judge's R & R is affirmed and adopted.

I. Factual Background

The underlying action in this case concerns Plaintiff Malibu Media, LLC's copyright infringement complaint alleging Defendant Leo Pelizzo infringed Plaintiff's copyrighted works by use of the peer-to-peer file sharing software BitTorrent. Plaintiff identified the Defendant as the infringer of its copyrighted material by obtaining a subpoena ordering Defendant's Internet Service Provider, Hotwire Communications, to provide the identity of the individual associated with the infringing Internet Protocol address [DE 47-9]. Plaintiff's complaint [DE 6] was

¹ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n. 19 (1994).

met by Defendant's motion to dismiss [DE 7] which was ultimately denied [DE 16].

On March 13, 2013, Plaintiff deposed the Assistant General Counsel of Hotwire Communications who informed Plaintiff that there was a very real possibility that the Internet Protocol address used to infringe Plaintiff's copyrighted works was used by an individual other than the Defendant [DE 38-1]. Thereafter, Plaintiff offered to dismiss the case [DE 47-6]. Defendant, however, would only agree to do so if, among other things, the Plaintiff agreed to pay \$17,500 in attorney's fees [DE 47-14]. Plaintiff's Counsel responded to Defendant's counteroffer by informing Defendant that he "will lose everything he owns and owe my clients hundreds of thousands of dollars." [DE 41-2]. The parties attended mediation on April 4, 2013, at which Plaintiff's counsel indicated his intent to dismiss the case [DE 49].

After propounding an offer to pay a portion of Plaintiff's fees to that point in the litigation, which Defendant elected to reject, Plaintiff filed a motion to dismiss its complaint with prejudice [DE 37]. The Court granted the motion and reserved for later any determination of appropriate attorney's fees [DE 40].

II. Defendant's Objections

Defendant filed six objections to the Magistrate's resolution of his Motion for Attorney's Fees and Costs. Most importantly, it must be noted that many of the objections upon which Defendant now hangs his hat

were not raised in his original motion. While these new arguments fail to undermine the Magistrate Judge's R & R, the Court is by no means under an obligation to address the new arguments. *Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009) (“[A] district court has discretion to decline to consider a party’s argument when the argument is not first presented to the magistrate judge.”). For the reasons discussed below each objection is overruled.

Objection I

This objection argues that the R & R erred in failing to consider the fact that Plaintiff served Hot-wire Communications with a subpoena requesting the name, address, telephone number, and email address of the person assigned the infringing Internet Protocol address 24.238.22.207, but failed to request confirmation that Mr. Pelizzo’s account was assigned that address at exactly 5:37 p.m. on February 6, 2012. Though Defendant does not indicate how this fact undermines the R & R, it would presumably go to the Magistrate’s resolution of the second of the four *Fogerty* factors, namely “motivation.”

Defendant makes general claims throughout his objections that Plaintiff is motivated by the desire to extort settlements out of and funds from innocent internet users who, in order to avoid the embarrassment associated with being accused of infringing adult video content, are willing to pay Plaintiff to go away without regard to the merits of its case. As

stated in the R & R and reiterated here, “Defendant has [still] not directed the Court to any evidence that would support even an inference that Plaintiff filed this suit to shame Defendant into a pre-suit settlement.” [DE 53]. Accordingly, the objection is overruled.

Objection II

Defendant’s next objection argues that Plaintiff’s failure to attempt a pre-suit resolution of this dispute calls into question Plaintiff’s subjective motivation in filing suit. The undersigned, however, agrees that six phone calls to the number provided by the Defendant’s Internet Service Provider in response to a subpoena are sufficient to demonstrate a good faith attempt to resolve the dispute without need for litigation. Though Defendant insinuates Plaintiff’s attempts were halfhearted at best, Plaintiff has only admitted that it was upon its sixth attempt to contact Defendant that it learned the line had been disconnected. [DE 57 at 7]. The Plaintiff need not avail itself of every form of communication, telephone, electronic mail, certified mail and others, to be regarded as having attempted a pre-suit resolution of the dispute. Accordingly, this objection is overruled.

Objection III

Objection III seems to suggest that, again, because Plaintiff did not, in addition to attempting to call Defendant six times, send him electronic or

certified mail, the complaint was filed for an improper purpose. As addressed *supra*, Plaintiff's numerous attempts to contact Defendant coupled with other evidence considered in the R & R, are sufficient to indicate that the impetus for filing suit in this case was to protect a valid copyright, albeit of debatable social value. As such, Objection III is overruled.

Objection IV

The fourth objection appears to address the first of the *Fogerty* factors, namely "frivolity." *Fogerty*, 510 U.S. at 534 n. 19. Defendant seems to allege that once Plaintiff was provided with passport and visa documentation demonstrating that Mr. Pelizzo had not been in the United States for a range of dates including February 6, 2012, Plaintiff's claims became frivolous. As the R & R makes clear, "Plaintiff would have been well within its rights to test the veracity of Defendant's assertions [and documents] through discovery." [DE 53]. This objection does not in any way undermine the R & R, and thus is overruled.

Objection V

Defendant's fifth objection takes issue with the R & R's conclusion that Plaintiff's decision as to the timing of the Assistant General Counsel's deposition "was not the result of foot dragging by Plaintiff's counsel." [DE 54]. Defendant goes on to "note" the timing of the filing of Plaintiff's complaint as evidence of its contention that "Plaintiff is self-servingly

manipulating the data upon which it relies.” *Id.* Although Defendant believes it “safe to assume” that Plaintiff knew Hotwire Communication’s data retention policy and was purposely manipulating it in bad faith, courts of law are not in the business of assuming. The Magistrate Judge’s conclusion was based on testimony contained in Plaintiff’s Counsel’s sworn declaration. No “assumptions” about what Plaintiff knew, without more, can in any way undermine the R & R. Such assumptions are neither safe nor persuasive.

Objection VI

Defendant’s final objection concerns Plaintiff’s methods to detect potential infringers. Specifically, Defendant takes issue with the R & R’s conclusion that “the detection methods employed by IPP Limited . . . have been relied upon in hundreds of lawsuits across the country and by law enforcement to locate criminals.” [DE 53 at 9]. This conclusion is based upon the affidavit of a twenty-two year veteran of the Palm Beach County Sherriff’s Department. Eleven of Officer, and later Detective Paige’s years with the Sherriff’s Department were spent in the computer crimes unit.

Defendant’s attempts to characterize Plaintiff’s inquiry as one for a static Internet Protocol address, rather than a dynamic Internet Protocol address are unpersuasive. Plaintiff’s subpoena and exhibits attached thereto instructed Hotwire Communications

to produce “documents sufficient to identify the true name, telephone number and e-mail address of each person who was assigned one of the IP addresses set forth in Exhibit A” on February 26, 2012 at 5:37 PM. [DE 49-2]. Regardless of how one characterizes Plaintiff’s inquiry, Defendant’s account was assigned to the infringing Internet Protocol address on the date specified. Consequently, Defendant’s final objection is overruled.

III. Plaintiff Counsel’s Conduct

It appears that Plaintiff’s Counsel has accepted this opportunity to improve his approach to conflicts in this and future cases. The Court expects that Counsel’s future conduct will exhibit the highest levels of professionalism. If not, he does so at his own peril. Let this case be a learning experience for all involved.

IV. Conclusion

Having carefully reviewed, *de novo*, Magistrate Judge Simonton’s R & R, the record, and the Objections, it is hereby

ORDERED that

- (1) All of the Defendant’s objections are **OVERRULED**;
- (2) The Report and Recommendation [DE 53] is **AFFIRMED** and **ADOPTED**, and incorporated by reference into this Order;

- (3) Defendant's Motion for Attorney's Fees [DE 41] is GRANTED IN PART;
- (4) Sanctions, in the form of attorney's fees, are awarded to Defendant and against Plaintiff's counsel in the amount of **\$6,815.50** pursuant to 28 U.S.C. § 1927;
- (5) This case is CLOSED.

DONE and ORDERED in Miami, Florida this 28th day of March, 2014.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

cc: All Counsel of Record
Honorable Andrea Simonton

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-22768-CIV-SEITZ/SIMONTON

MALIBU MEDIA, LLC,

Plaintiff,

v.

LEO PELIZZO,

Defendant.

REPORT AND RECOMMENDATION RE:
DEFENDANT'S VERIFIED MOTION
FOR ATTORNEY'S FEES AND COSTS

(Dated February 18, 2014)

This matter comes before the Court on Defendant Leo Pelizzo's Verified Motion for Attorney's fees and costs Against Plaintiff and Lipscomb, Eisenberg & Baker, P.L. (DE # 41), pursuant to an Order of Reference entered by the Honorable Patricia A. Seitz, United States District Judge. (DE # 19). Plaintiff Malibu Media, LLC ("Plaintiff") filed a response (DE # 45), Defendant filed a reply (DE # 46) along with supplemental authority (DE # 47) and Plaintiff filed a sur-reply (DE # 52). Having considered the parties' papers and the record, and for the reasons set forth below, the undersigned recommends that the Court grant in part and deny in part Defendant's motion for fees. Specifically, the undersigned recommends that the motion be denied with respect to the request for fees pursuant to the Copyright Act; and, that it be

granted in part with respect to the fees requested pursuant 28 U.S.C. § 1927; and, that fees and mediation costs be awarded in the amount \$6,815.70, which covers only the work performed after March 13, 2013, and through the mediation of this matter.

I. BACKGROUND

Plaintiff initiated this matter on July 27, 2012, when it filed a Complaint against Defendant alleging he infringed the copyrights of Plaintiff's adult films through the use of a filing sharing protocol known as BitTorrent.¹ (DE # 1). Prior to filing suit, Plaintiff's investigator, IPP Limited, identified the Internet Protocol ("IP") address 24.238.22.207 infringing 14 of Plaintiff's copyrighted movies a total of 337 times. (DE # 47-13). Plaintiff then obtained a subpoena commanding the Internet Service Provider ("ISP"), Hotwire Communications ("Hotwire"), for that IP address to provide the name, address, telephone number, email address and Media Access Control ("MAC") address for the individual assigned that IP address. (DE # 47-9, ¶2). In response, Hotwire identified Defendant as the subscriber of the IP address being used to infringe Plaintiff's movies on BitTorrent. (DE # 47-8).

Plaintiff served Defendant with the Complaint on September 5, 2012 (DE # 6), and Defendant's counsel

¹ See docket entry # 16, pages 2-3, for a detailed discussion of the BitTorrent protocol.

thereafter filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (DE # 7). Defendant argued that Plaintiff's Complaint contained only vague or conclusory statements and failed to set forth a sufficient basis for identifying Plaintiff as the infringer responsible for using the assigned IP address during the relevant time period. (*Id.* at 4-8). Plaintiff also submitted his affidavit in support of that motion to establish that he was in Venezuela for the "vast majority" of the time period that the infringement occurred, that the IP address identified by Plaintiff was not his IP address and that he had never used or heard of BitTorrent prior to this lawsuit. (DE # 7-1, at ¶¶5, 6 and 17). The presiding District Judge denied the motion on December 21, 2012, finding the allegations of the Complaint, together with the references in Exhibit A to the Complaint, sufficient to associate Defendant's alleged IP address with the incidents of infringement observed by IPP Limited. (DE # 16 at 6-7).

Thereafter, the parties' jointly moved for two extensions of time for Defendant to respond to the Complaint. (DE ## 17,22). The first motion indicated that Plaintiff would depose Hotwire in February 2013, and that a possible settlement was contingent on that deposition testimony. (DE # 17). The parties maintained that an extension of time was consistent with Federal Rule of Civil Procedure 1's instruction to promote the inexpensive determination of every action. (*Id.* at ¶6). The second motion indicated that the Plaintiff rescheduled the Hotwire deposition for

March and sought to extend the deadline for Defendant to file an answer to a date after the deposition since Plaintiff believed a settlement was likely following the deposition. (DE # 22 at ¶4). The motion further provided that, “[i]n order to minimize attorneys’ fees, Plaintiff has agreed to allow Defendant an additional sixty (60) days” to respond to the Complaint. (*Id.* at 5). The Court granted the first motion (DE # 18), but denied the second motion (DE # 22). Defendant filed his answer on February 22, 2012. (DE # 24). On March 13, 2013, the Court scheduled the parties’ mediation for April 4, 2013. (DE # 26).

On March 13, 2013, Plaintiff deposed the Assistant General Counsel for Hotwire, Laurie Murphy, in Philadelphia, Pennsylvania. (DE # 38-1). Defense counsel appeared by telephone. (*Id.*). Murphy testified that after she received Plaintiff’s subpoena, she emailed the IP address and the date and time of infringement to her technician, Milton Davidson, so that he could identify a subscriber. (*Id.* at p. 56). Davidson identified Defendant as the subscriber associated with the IP address, which Murphy, in turn, provided in a response to the subpoena. (*Id.* at 24). Murphy also stated that Defendant’s building makes use of “dynamic IPs,” which means that if a subscriber does not use the Internet for 24 hours, the IP address will return to a “pool” and be made available to another subscriber in the building. (*Id.*). She also conceded that Defendant’s building could have incorrectly labeled the port connected to Defendant’s condominium, which would have resulted in the

wrong IP address being associated with Defendant. (*Id.* at 39).

Following the Hotwire deposition on March 13, 2013, Plaintiff offered to dismiss the lawsuit contingent upon both parties signing mutual releases. (DE # 47-6, ¶12). On March 21, 2013, Defendant countered with an offer for Plaintiff dismiss the action with prejudice, pay \$17,500 in fees and file a statement with the Court indicating that Defendant was incorrectly identified as the downloader of the pornographic films. (DE # 47-14). Plaintiff's counsel immediately rejected the counter-proposal (DE # 41-2 at 1) and warned defense counsel that his client "will lose everything he owns and owe my clients hundreds of thousands of dollars" after a trial of this matter. (DE # 41-2). The following day, Plaintiff propounded nineteen requests for production and twenty-five interrogatories on Defendant. (DE ## 41-3, 41-4).

The parties attended mediation on April 4, 2013. Much of the five hour mediation was devoted to the amount of attorney's fees that were appropriate in this matter and the phrasing of a public statement regarding Defendant's innocence. (DE # 49 at 8; DE # 476, ¶16). Plaintiff's counsel informed defense counsel at the mediation that he would be dismissing the case. (DE # 47-6, ¶1). On April 11, 2013, Plaintiff offered to pay Defendant \$13,000 in fees, which Defendant rejected as his attorney's fees at that time were approximately \$24,000. (DE ## 47-15, 47-16 and 47-17). Plaintiff filed a Notice of Voluntary Dismissal (DE # 33) that same day, which was stricken on April

15, 2013, for failing to comply with Federal Rule of Civil Procedure 41(a). (DE # 34). Plaintiff then filed a motion to dismiss with prejudice (DE # 37) that the Court granted, reserving for a later determination the issue of what, if any, attorney's fees or sanctions were appropriate in this case. (DE # 40). Thereafter, Defendant filed the instant motion seeking an award of fees against Plaintiff pursuant to the Copyright Act and/or an award of fees as a sanction against Plaintiff's counsel pursuant to 28 U.S.C. § 1927. (DE # 41).

II. LEGAL STANDARD AND ANALYSIS

A. Attorney's Fees Under the Copyright Act

“While it is the general rule in American jurisprudence that litigants must bear their own attorney's fees, Congress has provided an exception for prevailing parties of copyright litigation.” *Oravec v. Sunny Isles Luxury Ventures L.C.*, Case No. 04-22780, 2010 WL 1302914, *3 (S.D. Fla. Mar. 31, 2010). The Copyright Act grants the district court the power to award a “reasonable attorney's fee to the prevailing party.” 17 U.S.C. § 505; *Dawes-Ordonez v. Forman*, 418 Fed. Appx. 819, 821 (11th Cir. 2011). Section 505, however, does not provide for automatic recovery of attorneys' fees by the prevailing party. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994). Rather, fees are to be awarded “only as a matter of the court's discretion.” *Id.* While “[t]here is no precise rule or formula for making these determinations,” courts typically consider factors such as “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.” *Id.* at 534 n.19 (citation omitted); *Dawes-Ordonez*, 418 Fed. Appx. at 821. The application of these factors must be “faithful to the purposes of the Copyright Act” and “applied to prevailing plaintiffs and defendants in an evenhanded manner.” *Fogerty*, 510 U.S. at 534 n.19. “In copyright cases, although attorney’s fees are awarded in the trial court’s discretion, they are the rule rather than the exception and should be awarded routinely.” *Oravec*, 2010 WL 1302914 at *3 (quotations omitted).

The parties concede that Defendant is a prevailing party in this matter due to Plaintiff’s voluntary dismissal of this action with prejudice. Therefore the Court turns to the four factors described in *Fogerty*.²

² Plaintiff frames the issue for the Court to decide as one of first impression, *viz*, whether a copyright owner’s deposition of an ISP provider furthers the interest of the Copyright Act when it appears the ISP provider made an error in correlating an IP address to a subscriber. (DE # 47 at 1). The Court does not share Plaintiff’s view that this is the critical issue for the Court’s determination. As set forth below, the Court must look to all of the Plaintiff’s actions in prosecuting this case from the pre-suit time period through the instant dispute over fees.

1. Plaintiff's Subjective Motivation

Defendant asserts that Plaintiff's desire for commercial gain was its subjective motivation for this suit. (DE # 41 at 12). Defendant argues that filing a lawsuit for infringing obscene films will strain a defendant's relationships with family and friends and cause both the innocent and guilty infringer to pay a few thousand dollars to Plaintiff rather than risk the filing of a public suit. (*Id.*). Defendant also suggests that Plaintiff's counsel made no effort to contact defense counsel until after the motion to dismiss had been filed, and only then to seek an extension of time to file a response, not to discuss the case. (*Id.* at 13). Defendant points to the repeated cancellation and postponing of the Hotwire deposition by Plaintiff's counsel as evidence that Plaintiff has "continued to drag its feet" throughout this proceeding. (*Id.*). Relying on *Oravec*, Defendant maintains that, in sum, Plaintiff's behavior consistently "indicate[d] a motivation to enlarge . . . profits to increase [the] potential recovery for copyright infringement" in this case. (*Id.* at 13-14).

The Court respectfully disagrees with all of Defendant's assertions. While it is true that a lawsuit for the infringement of pornographic films could subject a defendant to public embarrassment and result in an innocent infringer paying thousands of dollars to avoid a public lawsuit, Defendant has not directed the Court to any evidence that would support

even an inference that Plaintiff filed this suit to shame Defendant into a pre-suit settlement.³ Defendant has not provided a single communication from Plaintiff wherein it sought to settle this matter in exchange for thousands of dollars either before or after filing suit.

Moreover, Defendant has not done anything to disprove Plaintiff's stated motivation for filing suit, that the IP address associated with Defendant was one of the worst infringers in the world of Plaintiff's movies. (DE # 47 at 3). That assertion remains uncontroverted on this record. Unlike the BitTorrent cases cited by Defendant (DE # 41 at 12) (citing, e.g., *Malibu Media, LLC v. John Does 1-10*, No. 12-2623, 2012 WL 5382304 (C.D. Cal. June 27, 2012)), this lawsuit was filed against one defendant, and even then, only after Plaintiff's counsel attempted to contact Defendant by telephone six times over a span of five months prior to filing suit. (DE # 47-6, ¶7). These repeated attempts to contact Defendant pre-suit supports a conclusion that Plaintiff's motivation in bringing this suit was proper. *Cf. Dawes-Ordonez*, 418 Fed. Appx. at 821 (plaintiff's decision to sue before giving notice to defendant of its alleged

³ Defendant's reliance on and citation to acts and practices that occurred in other unrelated cases does not aid the Court's analysis here. (DE # 49-3). This was a suit filed without bad faith against one prolific infringer and survived a motion to dismiss. Defendant's reliance on inapposite circumstances unrelated to this litigation does not materially advance his position here.

infringement demonstrated a questionable subjective motivation.). That Plaintiff's counsel did not contact defense counsel until the motion to dismiss had already been filed is of no moment to the instant analysis.

Moreover, the conduct by Plaintiff's counsel throughout the duration of the lawsuit, with the exception of one incident that will be discussed *infra*, also evinced a proper motive for filing and continuing to maintain this lawsuit. After learning that there could be a correlation error with the IP address, Plaintiff's counsel took steps to prevent Defendant from incurring further attorney's fees prior to the Hotwire deposition by agreeing to extend Defendant's deadline to file an Answer until after that deposition, and by unilaterally drafting the Rule 26(f) report. (DE ## 17,22 47-6, ¶7). Rescheduling that deposition was not the result of foot dragging by Plaintiff's counsel, but stemmed from a need to schedule that deposition with depositions from another case to reduce Plaintiff's costs. (DE # 47-6, ¶11). Finally, Plaintiff's counsel immediately moved to voluntarily dismiss the lawsuit, but was unable to do so, initially, because the parties disputed the amount of attorney's fees that should be paid. *Virgin Records America, Inc. v. Thompson*, 512 F.3d 724, 726 (5th Cir. 2008) (plaintiff's decision to immediately move for dismissal after determining infringer was someone other than defendant supported conclusion that plaintiff prosecuted suit without malevolent intent.). These acts cumulatively support the Court's conclusion that

Plaintiff was properly motivated here, and counsel against awarding fees.

2. Frivolity of Plaintiff's Arguments

Notwithstanding Defendant's claims to the contrary, there should be no dispute that Plaintiff's claims were not frivolous at the commencement of this lawsuit. The Defendant did not contest the validity of the Plaintiff's copyright or that the sharing of Plaintiff's films through BitTorrent constituted the copying of original work under the Copyright Act, 17 U.S.C. § 501. Further, the presiding district judge determined at the motion to dismiss stage that Plaintiff had stated a prima facie case for copyright infringement. (DE # 16). Moreover, it remains unrefuted that *someone* using the IP address named in the pleadings infringed 14 movies a total of 337 times prior to the commencement of this suit and 25 movies a total of 549 times by the time the infringement ceased. (DE # 47-6, ¶¶2, 3). Defendant makes a half-hearted attempt to undermine the detection methods employed by IPP Limited, but those methods have been relied upon in hundreds of lawsuits across the country and by law enforcement to locate criminals. (DE # 47-3). Accordingly, this factor also militates against an award of attorney's fees for Defendant.

3 Objective Unreasonableness of Plaintiff's Claim

Defendant argues that Plaintiff continued to aggressively pursue this action well after it was objectively reasonable to do so. (DE # 41 at 11) (citing *Oravec*, 2010 WL 1302914, *3 (objective reasonableness analysis considers the reasonableness of Plaintiff's claims at the time it took the stance at issue or at the time it pressed the arguments)). Specifically, Defendant argues that Plaintiff should have immediately dismissed the action after: (1) learning on September 21, 2012, that Defendant had been out of the country for nearly all of the dates of infringement; or (2) learning on March 12, 2013,⁴ that Hotwire made a practice of reassigning IP addresses assigned to a user once that user had been inactive for over twenty-four hours. (*Id.*). The Court must reject both assertions. Expecting Plaintiff to *immediately* dismiss the lawsuit upon receipt of Defendant's affidavit explaining he was out of the country during the time of infringement is unrealistic. At a minimum, Plaintiff would have been well within its rights to test the veracity of Defendant's assertions through discovery. Defendant cites no authority for the proposition that the pursuit of this lawsuit became objectively unreasonable the moment Defendant came forward with potential exculpatory evidence.

⁴ Plaintiff deposed Murphy on March 13, 2013, so that Court assumes Defendant mistakenly identified March 12, 2013, in the response brief.

Further, the Court finds Defendant's assertion that Plaintiff should have dismissed this action immediately following Murphy's deposition on March 13, 2013, confounding since the record reflects that is exactly what Plaintiff attempted to do. (DE # 47-6, ¶12). It was only because of Defendant's demand for *all* of its costs and attorney's fees (\$17,500) that the matter was not dismissed at that time. The Court finds the continuation of the case at this point over the amount of attorney's fees at issue objectively reasonable.⁵ Accordingly, this factor also favors awarding no attorney's fees.

4. Considerations of Compensation and Deterrence

Defendant maintains that this factor supports an award of fees because "Plaintiff filed this suit by blindly relying on an IP address that – alone – was incapable of identifying the infringing party." (DE # 41 at 14). Defendant argues that Plaintiff could have asked Hotwire for the media access control address (MAC Address)⁶ associated with the infringement, but did not. (*Id.*). Defendant suggests that fees and costs

⁵ The undersigned believes that the approximately two week time period where Plaintiff threatened continued litigation of this matter is more properly addressed under the 28 U.S.C. § 1927 analysis, *infra*.

⁶ A MAC Address is a unique identifier capable of identifying a physical device such as a laptop, which can be used to connect an IP address to a device in the infringer's possession.

should be awarded here to deter future copyright holders from “initiating costly litigation without first attempting non-judicial resolution.” (*Id.* at 15).

Courts in this District have made it clear that considerations of compensation and deterrence under the Copyright Act “are inextricably intertwined with the reasonableness or frivolousness of the [p]arties’ positions, as well as their motivation in litigating the dispute.” *See, e.g., Oravec*, 2010 WL 1302914, *8. Thus, “a party that advances reasonable, good-faith positions should not be deterred from doing so, even if ultimately unsuccessful, as such claims or defenses help define the scope and limits of copyright protection.” *Id.* (citing *Donald Frederick Evans and Assoc., Inc. v. Continental Homes, Inc.*, 785 F.2d 897, 916 (11th Cir.1986) (under § 505, “a losing party’s good faith and the complexity of the legal issues likely would justify a denial of fees to a prevailing party.”). Here the Court has already determine that Plaintiff possessed a proper motivation in filing and pursuing this non-frivolous suit for infringement. Moreover, Defendant’s stated reason in support of this factor – Plaintiff never attempted a nonjudicial resolution of this matter – is inaccurate. The record reflects that Plaintiff attempted to contact Defendant at least six times without hearing back from Defendant. As such, this factor militates against an award of fees.

5. Balancing the *Fogerty* Factors

As set forth above, all of the *Fogerty* factors support denying attorney's fees in this case. Plaintiff's motivation in filing and maintaining this suit was proper and the lawsuit was not frivolous or objectively unreasonable. Consistent with other courts on similar facts, *see, e.g., Virgin Records America*, 512 F.3d at 726, the Court recommends that Defendant's request for attorney's fees under § 505 be denied.

B. Fees Pursuant to 28 U.S.C. § 1927

Defendant also seeks an award of attorney's fees pursuant to 28 U.S.C. § 1927 against Plaintiff's counsel, Lipscomb Eisenberg and Baker, PL. (DE # 41 at 15). Defendant argues that Plaintiff's failure to conduct a reasonable pretrial investigation coupled with the active pursuit of this matter well after acknowledging that Defendant was not the infringer support an award of sanctions here. (*Id.* at 16). In response, Plaintiff maintains that the Hotwire deposition was proper and not pursued in bad faith. (DE # 47 at 20). Further, "[e]verything following that deposition was aimed at resolving the fee dispute[.]" (*Id.*).

Title 28, United States Code, Section 1927 provides that "[a]ny attorney . . . 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.” 28 U.S.C. § 1927. The “key for unlocking” the power to sanction under 28 U.S.C. § 1927, is a finding of bad faith. *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, No. 09-60351 – PAS, 2011 WL 4433570, *4 (S.D. Fla. Sept. 21, 2011). Even if a Court finds an attorney acted with bad faith, however, a Court does not, *ipso facto*, award sanctions under section 1927. *Id.* Pursuant to 28 U.S.C. § 1927, a court “may,” but need not, sanction an attorney who “multiplies the proceedings . . . unreasonably and vexatiously.” 28 U.S.C. § 1927.

The parties’ arguments on this issue fail to capture the sanctionable conduct in this case. Defendant is incorrect, for the reasons stated above, that the Plaintiff’s inadequate pre-suit investigation and filing this suit with bad faith requires sanctions. Plaintiff is incorrect when it suggests that *everything* that occurred in this case following the Hotwire deposition was aimed at resolving the fee dispute. If, indeed, Plaintiff had devoted all of its efforts following that deposition to resolving the fee dispute, there would be no basis for an award of sanctions here. The record, however, reflects that Plaintiff’s counsel, for a brief period of time, vexatiously and unreasonably so multiplied this action that an award of sanctions is both just and proper.

Following the Hotwire deposition on March 13, 2013, Plaintiff offered to dismiss the lawsuit contingent upon both parties signing mutual releases. On March 21, 2013, Defendant presented a counter offer that required Plaintiff to dismiss the action with

prejudice, pay \$17,500 in fees and file a statement with the Court indicating that Defendant was incorrectly identified as the downloader of the pornographic films. (DE # 47-14). Plaintiff's counsel was "shocked" and "peevd" by the request for "clearly excessive fees" and, within thirty minutes of receiving the counter offer, sent two "knee-jerk" emails to defense counsel. (DE # 47, at 6). The first email stated that, "[y]our offer is rejected. I will see you at trial." (DE # 41-2 at 1). The second, more lengthy email provides as follows:

I would like to depose Mr. Pelizzo during the first two weeks of April. Please provide me with deposition dates. If you do not, I will unilaterally set it. Also, I am going to make a physical inspection of the port at the applicable building. If you have blackout dates in the second two weeks of April, please advise. Finally, I am going to depose the IT manager at Hotwire. The 30(b)(6) deposition pointed to only one possible error in the identification process. Once I close that loop, our case will be rock solid extremely strong (*sic*). As you may know, BitTorrent continues to distribute until a user tells affirmatively tells (*sic*) a BitTorrent Client to stop distributing the torrent file so your client being in-and-out of town during the applicable period of time does not undermine the assertion that he is the infringer. The list of infringements against your client is enormous. Respectfully, you should counsel him that when he loses, he will lose everything he owns and owe my

clients hundreds of thousands of dollars. Mark these words, your client's decision to reject a walk away will be the worst decision he will ever make.

(DE # 41-2). That email closes with a directive to another employee at Plaintiff's firm to send defense counsel discovery requests by the close of business. The following day, Plaintiff propounded nineteen requests for production and twenty-five interrogatories on Defendant. (DE ## 41-3, 41-4). Plaintiff's counsel suggests he "cooled quickly" and advised defense counsel at the mediation on April 4, 2013, that Plaintiff would voluntarily dismiss this case. Plaintiff then offered to pay Defendant \$13,000 in fees, which Defendant rejected as his attorney's fees at that time totaled approximately \$24,000. (DE ## 47-15, 47-16 and 47-17).

By both subjective and objective measures, the actions and threats as detailed in the second email constitute bad faith and a willful abuse of the judicial process. Plaintiff's counsel had just offered to voluntarily dismiss the claim against Defendant when he sent the email threatening protracted, future litigation. That alone would have been sufficient to award sanctions, but Plaintiff's counsel also asked defense counsel to inform his client that he would be penniless at the conclusion of this case while also owing Plaintiff hundreds of thousands of dollars. The litigation tactics of Plaintiff's counsel amount to more than a lack of professional civility and reveals a pattern of behavior, albeit for a short period of time, that

perpetuates “stereotyped caricatures of attorneys held by some members of the public.” *Managed Care Solutions*, 2011 WL 4433570, *3. Threatening continued, meritless litigation and financial ruin is the definition of bad faith. Accordingly, the Court will require Plaintiff’s counsel to “pay the costs, expenses, and attorneys’ fees reasonably incurred because of the attorney’s misconduct – that is, the excess costs that the attorney’s multiplication of proceedings has added to the cost of the litigation.” *Amlong & Amlong, P.A. v. Denny’s, Inc.*, 500 F.3d 1230, 1242 (11th Cir. 2007).⁷ The excess costs here consist of all attorney time⁸ from the receipt of the second email on March 21, 2013, through the mediation of this matter (\$5,740.50 comprised of 26.7 hours at hourly rates between \$195 and \$215), together with the cost of mediation (\$1,175.00),⁹ which total \$6,815.50.¹⁰

⁷ Plaintiff’s counsel has made no claim that he is unable to pay an award of attorney’s fees in this case.

⁸ The undersigned has disallowed the time spent by attorneys FJF and SC3 on March 27, 2013, for an internal conference regarding file status as not reasonably necessary. The objections lodged by Plaintiff as to the remaining items within this time frame are not persuasive; the undersigned finds the remaining billing entries reasonable as to time spent and the hourly rate. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

⁹ Although much of the mediation apparently was devoted to the fee dispute, mediation would not have been required if Plaintiff had dismissed this action following the Hotwire Deposition.

III. CONCLUSION

Based on the foregoing, the undersigned finds that Plaintiff is not entitled to attorney's fees pursuant to the Copyright Act but that an award of attorney's fees against Plaintiff's counsel pursuant to 28 U.S.C. § 1927 is warranted here. It is hereby,

RECOMMENDED that:

- (1) Defendant Leo Pelizzo's Verified Motion for Attorney's fees and costs Against Plaintiff and Lipscomb, Eisenberg & Baker, P.L. (DE # 41) be **GRANTED IN PART and DENIED IN PART**. The motion should be **GRANTED** such that sanctions are awarded to Defendant against Plaintiff's counsel in the amount of \$6,815.50 pursuant to 28 U.S.C. § 1927.

The parties will have until **March 4, 2014**, to file written objections, if any, for consideration by the assigned United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745, 749-50 (11th Cir. 1988); *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

¹⁰ The undersigned finds that the dispute over the payment of attorneys' fees was not undertaken in bad faith, frivolously or vexatiously; on the contrary, it was a legitimate dispute. Nevertheless, a dispute over attorney's fees does not excuse the failure to dismiss a baseless lawsuit.

DONE AND SUBMITTED in chambers in
Miami, Florida on the 18th day of February, 2014.

/s/ Andrea M. Simonton
ANDREA M. SIMONTON
UNITED STATES
MAGISTRATE JUDGE

Copies furnished via CM/ECF to:
The Honorable Patricia A. Seitz
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-11795-AA

MALIBU MEDIA, LLC,

Plaintiff-Appellee,

versus

LEO PELIZZO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Jun. 4, 2015)

ON PETITION(S) FOR REHEARING AND PETI-
TION(S) FOR REHEARING EN BANC

BEFORE: JULIE CARNES, FAY and COX, Circuit
Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no
Judge in regular active service on the Court having
requested that the Court be polled on rehearing en
banc (Rule 35, Federal Rules of Appellate Procedure),
the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. R. Cox
UNITED STATES CIRCUIT JUDGE

ORD-42
