

Case No. 14-11795

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

MALIBU MEDIA, LLC,

Plaintiff-Appellee,

v.

LEO PELIZZO

Defendant-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

APPELLANT'S INITIAL BRIEF

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit, Defendant/Appellant submits the following complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the above-captioned matter:

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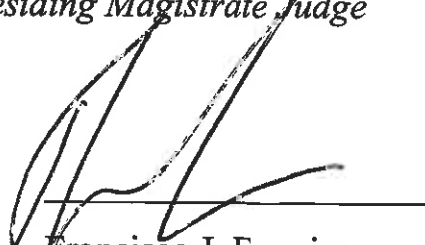
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Seitz, the Honorable Patricia A., *Presiding District Judge*

Simonton, the Honorable Andrea M., *Presiding Magistrate Judge*


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STATEMENT REGARDING ORAL ARGUMENT

The Appellant believes the briefs and the record adequately present the factual and legal arguments raised in this case and, therefore, does not request an oral argument. Appellant will, of course, participate in any oral argument the Court believes will aid in its adjudication of this matter.

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STATEMENT OF SUBJECT-MATTER AND JURISDICTION

On March 28, 2014, the Southern District of Florida entered an order denying Appellant's request for attorney's fees pursuant to 17 U.S.C. § 505 and granting sanctions against Plaintiff pursuant to 28 U.S.C. §1927. [DE#58]. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294 as the appeal concerns a final order issued by a United States district court located within the area embraced by the Eleventh Circuit. This Court has subject matter jurisdiction over the Copyright Act's fee provision pursuant to 28 U.S.C. §§ 1331 and 1338(a).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court failed to properly apply the *Fogerty* factors in declining to award attorneys' fees and costs to Defendant pursuant to 17 U.S.C. § 505 by focusing on Defendant's failure to provide evidence that Plaintiff acted in "bad faith".

2. Whether the district court failed to properly apply the *Fogerty* factors in declining to award attorneys' fees and costs to Defendant pursuant to 17 U.S.C. § 505 by failing to apply a presumption in favor of Defendant's entitlement to fees.

3. Whether the district court failed to properly apply the *Fogerty* factors in declining to award attorneys' fees and costs to Defendant pursuant to 17 U.S.C. § 505 by failing to assess the Defendant's entitlement to fees in light of the Copyright Act's goals.

4. Whether the district court abused its discretion in denying Defendant's request for an award of attorneys' fees pursuant to 17 U.S.C. § 505 by committing a clear error of judgment or relying on a clearly erroneous finding of fact.

STATEMENT OF CASE

Over the past several years, various adult film companies disparagingly referred to as “copyright trolls” have established highly lucrative revenue streams derived entirely from copyright enforcement settlements. Of these so-called copyright trolls, Plaintiff Malibu Media, LLC (“Malibu Media”) is far and away the most prolific. It filed nearly 2,000 lawsuits between February 2012 and May 2014 (an average of three suits per day) and, as reported by *the New Yorker* earlier this year, has accounted for nearly 40% of the copyright infringement lawsuits filed in the U.S. over the past year.¹ Malibu Media traces the source of infringing activity through a third-party investigator that tracks and records the Internet Protocol address (“IP Address”) associated with each infringing download. [DE #1-4 at ¶¶4-6, 12]. Using the investigator’s evidence, Malibu Media’s attorney must request a subpoena compelling the Internet Service Provider to disclose the subscriber assigned to each IP Address at a particular date and time. Most residential internet accounts receive temporary IP Address leases (referred to as “dynamic IP address assignments”). [DE #38-2 at p.2, ¶O]² The IP Address assigned to an internet account may change when a wireless router is reset or if an internet connection

¹ Gabe Friedman, The Biggest Filer of Copyright Lawsuits? This Erotica Web Site, NEW YORKER (May 15, 2014), available at <http://www.newyorker.com/online/blogs/currency/2014/05/the-biggest-filer-of-copyright-lawsuits-is-this-erotica-web-site.html>;

² WhatIsMyIPAddress.com, <http://whatismyipaddress.com/ip-basics> (last accessed August 6, 2014)

remaining inactive for more than 24 hours. [DE #38-2 at p.2, ¶O]. For this reason, the subpoena provided to an Internet Service Provider must specify the exact date and time the infringement in order to accurately identify the subscriber. [DE #1-4, ¶10 and 22] This request must be timely as the records containing the date and time of IP assignments are retained by Internet Service Providers for very short periods of times. [DE #1-4, ¶11].

All activity from an internet account is branded with the same IP Address regardless of the internet device used.³ Internet Service Providers, therefore, can only identify the person that pays for the internet service in question. [DE#38-1, p. 25, lns 5-17] One copyright plaintiff has estimated "that 30% of the names turned over by ISPs are not those of individuals who actually downloaded or shared copyrighted material." See Patrick Collins, Inc. v. Doe, 2013 U.S. Dist. LEXIS 39187 at *8 (E.D. Pa. Mar. 21, 2013). Therefore, 'it is no more likely that the subscriber to an IP address carried out a particular computer function ... than to say an individual who pays the telephone bill made a specific telephone call.'" In re Bittorrent Adult Film Copyright Infringement Cases, 2012 WL 1570765, at *3 13 (E.D.N.Y. May 1, 2012).

³ How and Why All Devices in Your Home Share One IP Address, <http://www.howtogeek.com/148664/how-and-why-all-devices-in-your-home-share-one-ip-address> (last accessed August 6, 2014).

STATEMENT OF FACTS

1. On February 15, 2012, Malibu Media obtained a pure bill of discovery subpoena from the Eleventh Judicial Circuit of Miami-Dade County requiring various Internet Service Providers to release the names of 347 internet account-holders. [DE#13-1 (Order Granting Mot. for Internet Service Providers to Disclose Identifying Information of Unknown Doe Defendants.))] This subpoena commanded each Internet Service Provider to provide Malibu Media with “the true name, address, telephone number, e-mail address, and Media Access Control (“MAC”) Address of [any] Defendant to whom the ISP assigned an IP address as set forth in Exhibit A of the Complaint.” [DE#13-1, at ¶2.] The aforementioned Exhibit was a spreadsheet created by Malibu Media presenting each of the numbered “Doe” defendants alongside (1) an IP Address; (2) the exact date and time the IP Address was allegedly engaged in an infringing act; (3) the name of the infringed work; and (4) the name of their Internet Service Provider. [DE#13-1, pp. 5-19.]

2. The Miami-Dade court’s order stipulated that “Plaintiff may only use the information disclosed in response to a subpoena served on the ISP for the purpose of protecting Plaintiff’s rights as set forth in the Complaint.” [DE#13-1, at ¶11.] Malibu Media’s only claim against the IP Address at issue in this proceeding (24.238.22.207) (hereinafter “the infringing IP Address”) related to the alleged infringement of “Veronika Coming Home” at “2/6/2012 at 17:37.” [DE#13-1, p. 6,

Entry No. 34 (DOE #34)]. The Internet Service Provider associated with this IP Address was Hotwire Communications, LLC (hereinafter “Hotwire Communications.”) *Id.* Due to the county court’s lack of jurisdiction over the underlying copyright claims, the bill of discovery order effectively terminated the proceeding and Malibu Media was left to exercise its own discretion over the use of the personal information provided.

3. On February 20, 2012, Malibu Media served Hotwire Communications with a subpoena requiring it to “provide 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 by April 5, 2013”. [DE #49-2]. Despite receiving the court’s authority to do so, Malibu Media did not request the Media Access Control (“MAC”) address associated with the activity. *Compare* [DE#13-1, at ¶2] *with* [DE #49-2]. This information would have allowed Malibu Media to identify the specific device used to commit the infringement.⁴ Hotwire Communications later testified it would have provided this information if requested. [DE #38-1, at pp. 73 - p.74 1-9.]

4. On April 5, 2012, Hotwire Communications responded to Malibu Media’s response by providing it with Leo Pelizzo’s name, mailing address, email address,

⁴ A MAC Address is a unique identifier capable of identifying a physical device (such as a laptop or computer.) See “MAC Addressing”, About.Com, <http://compnetworking.about.com/od/networkprotocolsip/1/aa062202a.htm> (last accessed August 6, 2014).

and phone number. [DE #13-2]. The letter failed to specify the date or time that Mr. Pelizzo's internet account was assigned to the IP Address in question. *Id.* Malibu Media's counsel would later admit that Mr. Pelizzo's name was provided as the result of a correlation error. [DE#47 at p. 8 and DE# 47-6, ¶ 5.]

5. After receiving Mr. Pelizzo's contact information on April 5, 2012, Malibu Media allowed nearly four (4) months to elapse before filing its Complaint. [DE#1, filed on July 27, 2012]. Despite possessing Mr. Pelizzo's email and mailing address, Malibu Media's attorney did not – at any point in these four (4) months – make any effort to send Mr. Pelizzo an email, a letter, or any other form of written communication that could have informed him of Malibu Media's potential claims. Hotwire, also, has no record of having contacted Mr. Pelizzo before releasing his information. [DE #38-2 at ¶A]. Malibu Media, instead, limited its pre-suit inquiry to five (5) unsuccessful attempts to reach Mr. Pelizzo by phone. The last of these five calls was placed on June 4, 2012 -- nearly two months *before* Malibu Media filed suit on July 27, 2012. [DE#47-6, at 7].⁵ In a subsequently retracted filing, Malibu Media stated that the phone number was disconnected on each of these occasions.⁶

⁵ As noted below, this date coincides with the expiration of Hotwire Communications' retention period.

⁶ Six days after filing the motion containing this statement, Plaintiff successfully moved to retract it. [DE #9 (Moving to strike [DE#8]). While not in the record, the document remains freely accessible online (<http://goo.gl/1QCjD8>)

6. Malibu Media's counsel did, however, spend these four months copyrighting various new films that would form the basis for its allegations against Mr. Pelizzo. [See ¶8 below.]

7. On July, 27, 2012, Plaintiff filed a boilerplate copyright infringement complaint alleging that Mr. Pelizzo had reproduced and distributed fourteen (14) pornographic films between January 3, 2012 and May 29, 2012. [DE#1, ¶2 "Defendant's Internet service was used to illegally distribute each of the copyrighted movies set forth on Exhibit A."]. The allegations were supported by the declaration of an investigator in Germany who allegedly traced these activities to an Internet Protocol address ("IP Address") assigned to a Hotwire Communications' ("Hotwire") internet subscriber. [DE#1-4 at ¶4]. This investigator, Tobias Feiser, is responsible for "personally" extracting and compiling this evidence. DE #1-4 at ¶16-18]. He also responsible for "attesting to the results of the investigation." [DE #1-4 at ¶13, 19, 21]. Earlier this year, it was revealed that Mr. Feiser and his company are reimbursed pursuant to a contingency fee agreement providing a percentage of each settlement proceed.⁷

⁷ Mike Masnik, International Men Of Mystery, TECHDIRT.COM (June 3, 2014), at <https://www.techdirt.com/articles/20140603/18021127448/international-men-mystery-how-discredited-german-anti-piracy-company-may-secretly-be-behind-malibu-medias-copyright-trollery.shtml>

8. Malibu Media's claims against Mr. Pelizzo were prefaced on the alleged infringement of fourteen films. The title, publication date, and registration date of each of these films (located at [DE #1-2]) is reproduced below:

Title	Published	Registered
1. Anneli Dream Girl	12/19/2011	01/04/2012
2. Anneli Leila Menage a Tois	01/13/2012	01/17/2012
3. Angel Seaside Romp	01/04/2012	01/06/2012
4. Veronika Coming Home	01/25/2012	02/03/2012
5. Like The First Time	02/29/2012	02/29/2012
6. Blonde Ambition	03/05/2012	03/06/2012
7. California Dreams	03/12/2012	03/12/2012
8. Lunchtime Fantasy	03/19/2012	03/19/2012
9. Breakfast in Bed	04/16/2012	04/17/2012
10. Evening at Home Part #2	04/04/2012	04/04/2012
11. Wild at Heart	04/08/2012	04/09/2012
12. One Night Stand	05/02/2012	05/02/2012
13. Pretty Back Door Baby	05/08/2012	05/10/2012
14. Romantic Memories	05/16/2012	05/16/2012

9. As shown above, with the exception of the first four (4) films, none of these works existed on the date that Plaintiff served its subpoena on Hotwire Communications (February 20, 2012.) Further, only one of these films -- *Veronika Comes Home* – was infringed on the date that Malibu Media targeted the identification (February 6, 2012.) See [DE#1-2]. The lower court also identified various other discrepancies in Malibu Media's exhibits. [DE #16, at p. 4 FN 4]

10. Despite having declined to email or write Mr. Pelizzo in the preceding four months, the Complaint asserted that “Defendant is the only person who can be identified as the infringer at this time”. [DE#1, ¶24].

11. On August 20, 2012, Mr. Pelizzo – a Venezuelan citizen in his sixties – arrived in the United States to learn he was the target of a Federal lawsuit. On September 21, 2012, Defendant filed a Motion to Dismiss that was accompanied by visa and passport documents showing that Mr. Pelizzo had been out of the country from January 8, 2012 to August 20, 2012. [DE #7 and DE #7-1, p. 5 and corresponding Exhibit A.] Mr. Pelizzo also provided documents showing that the infringing IP Address was not currently associated with his internet account. [DE #7-1, at ¶17 and corresponding Exhibit B.] The Motion also clarified that the internet service in question was provided to Mr. Pelizzo’s unit by the condominium association for his 700-unit building. [DE #7-1 at ¶¶7-13]. Malibu Media, thereafter, filed an opposition asserting that the infringing activity was on-going and accusing Mr. Pelizzo of downloading six (6) additional pornographic works. [DE #9]. On December 21, 2012, the district court denied Defendant’s Motion to Dismiss. [DE #16] In doing so, the court accepted the factual allegations made in Malibu Media’s complaint as true. [DE #16, p.1 FN1 and DE#16, p. 7 FN5]

12. In late-December 2012, Plaintiff noticed the 30(b)(6) deposition of Hotwire Communications for February 11, 2013. [DE #22, ¶2-3] [DE#47-24]. Malibu

Media's 30(b)(6) request did not, however, ask Hotwire to conduct a second IP identification [DE#38-2]. Instead, Malibu Media deposed Hotwire for two reasons: "(a) to ascertain if and how the correlation error occurred; and (b) and to determine if it would be possible to identify the infringer." [DE#47-6, at ¶9.] In short, rather than requesting a second IP investigation into the infringement, Malibu Media scheduled a deposition several months in the future to determine "if that would be possible." *See id.*

13. Malibu Media's attorney was, at least as early as October 2012, admitting the possibility a correlation error occurred. [DE#39-1] and [DE#47 at p. 8 and DE# 47-6, ¶ 5]. Nevertheless, he did not dismiss the underlying action until late-April 2013. He rationalized the pendency of the action against Mr. Pelizzo by periodically asserting that the infringing activity was continuing under the same IP address. [DE#47-6, at ¶2-3.] He has also claimed that "[f]rom Plaintiff's perspective, this suit was aimed at one of its worst infringers." [DE#47, p.8].

14. Yet, Malibu Media never made an effort to investigate these infringing activities. Specifically, the only way for Malibu Media to determine whether an error occurred during the initial investigation and to gather evidence relating to the infringement would have been to request an IP investigation targeting another date and time that the IP address was associated with an infringing act. [DE #13, p.6]

15. Moreover, Malibu Media's attorney knew that Internet Service Providers only

retain the information needed to correlate an IP address to a person at a given time for a very limited amount of time. [DE #1-4, ¶11]. He had, for instance, amended his original bill of discovery complaint (which included various Hotwire subscribers) to remove “Does” whose infringing acts had occurred beyond the Internet Service Provider’s document retention period [DE#13-1 at ¶5.] In this case, however, he appeared to be in no hurry to locate the source of the infringement.

16. On February 1, 2013, Malibu Media’s counsel received Hotwire’s 30(b)(6) responses. [DE #38-2, Responses from Hotwire Communications, LTD 2-1-13]. This response stated, among other things, that (1) that “*the current user of the IP in question is not Mr. Pelizzo*”; and (2) that “if Mr. Pelizzo’s PC or router is offline for more than 24 hours, the lease [of the IP Address] expires and may be assigned to another subscriber. [DE #38-2 at p.2, ¶O].

17. After receiving this document, Plaintiff immediately cancelled the deposition set to occur a few days later by citing a “scheduling conflict.” [DE #22, ¶2-3]. Neither Defendant nor the court were provided with Hotwire’s responses or informed of their existence. [DE #22 (providing Plaintiff’s explanation for the cancellation)].

18. Malibu Media has asserted that the infringing activity continued for the IP address in question continued until January 2013. [DE#47-6, at ¶2-3.] Hotwire

Communications only retains subscriber records for two (2) months. [DE#38-1, p.27 lns. 15-16, p. 75 lns 10-22]. Thus, any records relating to the infringing activity would have been destroyed by March 2013.

19. When Malibu Media's counsel cancelled the deposition, he rescheduled it for March. [DE#38-1, p.45 lns. 4-15]. Thus, by the time the nature of the investigation came to light, any evidence capable of proving the error stemmed from Malibu Media's own data or tactics had been destroyed. This left Malibu Media free to contend that that "the error very likely occurred from Defendant's building misreporting to Hotwire the condominium unit to which the subject IP address was assigned." [DE #47, p. 8].

20. This strategic timing is also present in Malibu Media's complaint. Specifically, the most recent infringing act alleged in Malibu Media's complaint occurred on May 17, 2012 (more than two months its filing July 27, 2012.) See DE #1-2.

21. Hotwire's corporate designee, Laurie M. Murphy, Esq. was finally deposed on March 12, 2013. Ms. Murphy's testimony revealed a disconcerting number of holes in Hotwire's internal investigation and recordkeeping practices. See [DE #38-1]. Ms. Murphy, for example, testified that the IP Investigation was conducted by an unsupervised "technician" that was no longer employed by Hotwire [DE# 38-1,

p. 55, lns. 12-25, p.56-57]. She also indicated that she had *not* provide the technician the “exact” time the infringement occurred. [DE# 38-1 at p.66].

Q. Okay. What about, do you provide the tech with any information about a specific time of day?

A. No.

Q. So is it accurate to say that the tech is given a date, and then they may arbitrarily choose the time of day to search for the connection between the IP address and the subscriber?

A. Yes

[DE#38-1 at p.78 lns 7-25 – p.79]

22. Following the deposition, Malibu Media’s attorney proposed a “walk-away” with each party bearing its own fees. Unwilling to forgo the right to recover its fees, Defendant countered by requesting reimbursement of the fees spent defending the action (approximately \$17,500 at the time), as well as Malibu Media’s agreement to file a statement with the court publicly acknowledging that Mr. Pelizzo was wrongly accused. See [DE# 41-2] Only minutes after receiving Defendant’s offer, Plaintiff’s counsel lashed out in an email stating that “*you should counsel [your client] 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.*” See [DE# 41-2]. On

March 22, 2013, he served Defendant with Interrogatories and Requests for Production. See [DE#41-3 and DE#41-4].

23. On April 4, the parties held a mediation that failed to result in a settlement as Malibu Media was unwilling to fully reimburse Defendant's fees. Plaintiff eventually moved to dismiss its action on April 26, 2013. [DE #37]

24. Defendant, thereafter, filed a petition seeking fees pursuant to the Copyright Act (17 U.S.C. §505) and 28 U.S.C. §1920, §1927. [DE #41] The Report and Recommendation, later adopted by the trial court, denied Mr. Pelizzo's request for fees under the Copyright Act; but, pursuant to 28 U.S.C. §1927, granted fees for work performed from March 14, 2013 and through the mediation of the matter (\$7,000.) [DE #53 and DE#58] Defendant subsequently appealed.

STATEMENT OF REVIEW

Fogerty v. Fantasy, Inc. sets forth various factors that may be used to determine whether to award a prevailing party's fees and costs under the Copyright Act. 510 U.S. 517 (1986). In reviewing a district court's decision to grant or deny fees under the Copyright Act an appellate court must "first determine whether 'the district court weighed the relevant factors [in awarding fees and costs under 17 U.S.C. § 505].'" *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 198 F.3d 840, 842 (11th Cir. Fla. 1999). Next, it must decide whether the district court's decision was an abuse of discretion. *See id.* An abuse of discretion occurs where a district court has made "a finding of fact that is clearly erroneous or commit[ed] a clear error of judgment." *Dawes-Ordonez v. Forman*, 418 Fed. Appx. 819, 821 (11th Cir. Fla. 2011).

SUMMARY OF THE ARGUMENT

Defendant/Appellant respectfully submits that the district court's denial of its 17 U.S.C. § 505 fee petition was prefaced upon (1) an erroneous application of the *Fogerty* standard; and (2) a clearly various erroneous assessment of the evidentiary record.

The lower court erred in weighing the *Fogerty* factors in three ways. First, the court inappropriately hinged much of its reasoning on Defendant's failure to prove that Plaintiff acted in "bad faith". See *MiTek Holdings, Inc.*, 198 F.3d at 842 ("a showing of bad faith or frivolity is not a requirement of a grant of fees."); *Kernel Records Oy v. Mosley*, 2013 U.S. Dist. LEXIS 99094 at *22 (S.D. Fla. July 16, 2013) ("Defendants, as the prevailing parties, need not establish that [the plaintiff] was acting in bad faith"). Second, the court erred by failing to apply a presumption in Defendant's favor. *Lil' Joe Wein Music, Inc. v. Jackson*, 2008 U.S. Dist. LEXIS 112730 (S.D. Fla. June 6, 2008) (noting that "where a defendant is the prevailing party in a copyright case, the presumption in favor of awarding fees is very strong.") Third, the court erred by failing to consider each of the §505 factors in relation to the Copyright Act's interests. See *MiTek Holdings, Inc.*, 198 F.3d at 842-43 (finding that "the district court [failed to] assess whether imposition of attorney's fees would further the goals of the Copyright Act.").

Moreover, even if the court were found to have applied the correct legal standard, a review of the evidentiary record makes it apparent that the court abused its discretion by relying on manifestly incorrect and unsupported "findings" of fact. Specifically, in deciding whether to grant an award of fees, a court must consider the entire record, including conduct during discovery and evidence (or lack thereof) presented during the course of the litigation to support the plaintiff's contentions. *Amadasun v. Dreamworks, LLC*, 359 F. Supp. 2d 1367, 1376 (N.D. Ga. 2005). Here, the district court erroneously supplanted a review of the factual record with a finding that Plaintiff met the requisite formalities for a copyright claims. To compound matters, the court also made various errors in assessing the factual record. Thus, for the reasons discussed below, Defendant respectfully requests that this Court vacate the district court's March 28, 2014 denial of Defendant's 17 U.S.C. § 505 fee petition.

ARGUMENT

I. DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS UNDER 17 U.S.C. § 505

A. The Copyright Act Is the Touchstone of the § 505 Analysis

The Supreme Court has articulated several non-exclusive factors that may be considered in deciding whether to award a prevailing party's fees and costs under §505, namely: (1) motivation; (2) objective unreasonableness (both in the factual and legal components of the case); (3) frivolousness; and (4) the need in particular circumstances to advance considerations of compensation and deterrence. *Fogerty*, 510 U.S. at 535 n. 19 (citing *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986).) In adopting these factors, the Supreme Court added a caveat requiring that they be applied in a manner "faithful to the purposes of the Copyright Act." *Mitek Holdings, Inc. v. Arce Eng'g Co.*, 198 F.3d 840, 842 (11th Cir. 1994) (quoting *Fogerty*, 510 U.S. at 535 n.19.) Therefore, the "touchstone" of the § 505 analysis is whether or not the award will further the interests of the Copyright Act. *MiTek Holdings, Inc.*, 198 F.3d at 842-43; *see also Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 854 (11th Cir. 1990 (a court should consider "further[s] . . . the policies of the law that are being enforced, as informed by the court's familiarity with the matter in litigation and the interest of justice.")) Consequently, a court deciding to award or deny a prevailing party's fees must explain how its decision is aligned with the interests of the Copyright Act. *See, e.g., Casella v.*

Morris, 820 F.2d 362, 367 (11th Cir. 1987)(remanding to the district court as its decision was not accompanied by reasoning tying the ruling to "the policies of the law that are being enforced, as informed by the court's familiarity with the matter in litigation and the interest of justice"); *Susan Wakeen Doll Co. v. Ashton-Drake Galleries*, 272 F.3d 441, 457 (7th Cir. Ill. 2001) (vacating an award as "[t]he district court did not indicate what behavior it was trying to deter, or how the "particular circumstances" in this case weighed in favor of awarding attorney's fees.").

B. Defendant Has a Strong Presumptive Entitlement to a §505 Award

Though attorney's fees are awarded in the trial court's discretion, in copyright cases "they are the rule rather than the exception and should be awarded routinely." *See, e.g., Oravec v. Sunny Isles Luxury Ventures L.C.*, 2010 U.S. Dist. LEXIS 32390 at *3 (S.D. Fla. Mar. 30, 2010). This is particularly true if the §505 award will advance the Copyright Act's interest in encouraging parties "to vindicate or defend their rights where it would otherwise be uneconomical to do so." *See Bait Prods. Pty v. Wallis*, 2013 U.S. Dist. LEXIS 148913 (M.D. Fla. Sept. 27, 2013)(citing *Fogerty*, 510 U.S. at 529.) Unlike copyright plaintiffs, which are incited to pursue meritorious claims by the prospect of a statutory award, copyright defendants have no financial incentive for pressing forward with a meritorious defense. Section 505 awards are, therefore, the Copyright Act's sole means of encouraging the pursuit of meritorious defenses. *See Assessment Technologies of Wisc., Inc.*, 361 F.3d at 436-

37 (observing that “without the prospect of such an award, the party might be forced into a nuisance settlement or deterred all together from exercising [their] rights.”)

For this reason, district courts in the Eleventh Circuit have routinely held that “the presumption in favor of awarding fees is very strong [when] a defendant is the prevailing party.” *Lil' Joe Wein Music, Inc. v. Jackson*, 2008 U.S. Dist. LEXIS 112730 at *4 (S.D. Fla July 1, 2008); *Hermosilla v. Coca-Cola Co.*, 2011 U.S. Dist. LEXIS 156499 at *9 (S.D. Fla. July 15, 2011), affirmed by, *Hermosilla v. Coca-Cola Co.*, 446 Fed. Appx. 201 (11th Cir. Fla. 2011); *Corwin v. Walt Disney World Co.*, 2008 U.S. Dist. LEXIS 112545 at *37-38 (M.D. Fla. Mar. 19, 2008); *Amadasun v. Dreamworks, LLC*, 359 F. Supp.2d 1367, 1376 (noting that “defendants have an interest in being compensated for their successful defense of this action. In addition, potential plaintiffs must be deterred from bringing frivolous and baseless suits.”)

C. *An Award of Fees Does Not Hinge on Bad Faith or Frivolousness*

The *Fogerty* decision explicitly rejected prior 505 standards requiring prevailing defendants to demonstrate the plaintiff's bad faith or the frivolousness of a claim. *Fogerty*, 510 U.S. at 535 n.19 (requiring that the factors must be “applied to prevailing plaintiffs and defendants in an evenhanded manner.”) Since then, it has been well-established that a plaintiff’s “good faith in bringing its suit [is] not determinative of the issue of attorney's fees.” *MiTek Holdings, Inc.*, 198 F.3d at 842 (citing *Sherry Mfg. Co. v. Towel King of Florida, Inc.*, 822 F.2d 1031, 1034 (11th

Cir. Fla. 1987); *Amadasun v. Dreamworks, LLC*, 359 F. Supp. 2d 1367, 1376 (N.D. Ga. 2005)(“Even if plaintiff brought his copyright infringement suit in good faith, good faith is not determinative of the issue of attorneys' fees.”); *Kernel Records*, 2013 U.S. Dist. LEXIS 99094 at 23-24; *Riviera Distributors, Inc. v. Jones*, 517 F.3d 926 (7th Cir. 2008)(reversing the lower court’s denial of a prevailing defendant’s attorney's fees as the court’s decision had been prefaced upon the defendant’s failure to persuade the court that the plaintiff’s "pursuit of th[e] action was frivolous, baseless, or objectively unreasonable.")

II. THE DISTRICT COURT ERRED IN APPLYING THE LEGAL STANDARD FOR § 505 DETERMINATIONS

a. The Court Focused on Bad Faith and Frivolousness

The only preconditions to an award of fees is that the party receiving the fee be the 'prevailing party' and that the fee be reasonable.” *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 832 (11th Cir.1982) A prevailing defendant is, therefore, not required to demonstrate that the plaintiff acted in bad faith or maintained a frivolous legal claim as a precondition to recouping its fees. As shown below, the lower court's reasoning focused heavily on Defendant's failure to prove Plaintiff's acted in bad faith.

“Defendant has done nothing 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. That assertion remains uncontroverted on this record." [DE #53, 7-8];

"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." [DE #53, P. 8];

"Defendant's reliance on citation to acts and practices that occurred in other unrelated cases does not aid the Court's analysis here." [DE #53, P.7, n3.]

"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". [DE #53, p.10]

"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." [DE 53, P.7]

"Defendant has done nothing 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. That assertion remains uncontroverted on this record." [DE 53, 7-8];

In addition to erroneously focusing on bad faith, many of these statements are undermined by the evidentiary record.

b. The Court Failed to Apply a Presumption in Defendant's Favor

The Defendant's prevailing status in this copyright action provides him with a "strong presumptive entitlement" to an award of attorneys' fees under Section 505. "A presumption is a deduction which the law expressly *directs* to be made from particular facts." CHARLES A. WRIGHT ET AL., FED. PRAC. & PROC. EVID. §5124 (2d ed. 2012); see also id. §§ 5122.1, 5124 (contrasting the mandatory nature of a presumption with an "inference", which is voluntary by nature.) As such, the

District Court erred by failing to apply this presumption in weighing the §505 fee factors. *See also Oravec*, 2010 U.S. Dist. LEXIS 32390 at *3. (noting that a prevailing party's fee awards "are the rule rather than the exception and should be awarded routinely.")

c. *The Court Failed to Assess the Copyright Act's Interests*

Finally, the district court erred by failing to consider whether awarding attorney's fees under § 505 "will further the goals of the Copyright Act. . . by encouraging the raising of objectively reasonable claims and defenses." *Mitek Holdings, Inc. v. Arce Engineering Co., Inc.*, 198 F.3d 840, 842 (11th Cir. 1999) (quoting *Fogerty*, 510 U.S. at 526-27); *see also Susan Wakeen Doll Co. v. Ashton-Drake Galleries*, 272 F.3d 441, 457 (7th Cir. Ill. 2001) (vacating an award as "[t]he district court did not indicate what behavior it was trying to deter, or how the "particular circumstances" in this case weighed in favor of awarding attorney's fees."). A review of the lower court's opinion reveals it completely failed to assess the evidentiary record in relation to the Copyright Act's interests. The court found, for instance that:

"[S]ix phone calls to the number provided by the Defendant's [ISP] are sufficient to demonstrate a good faith attempt to resolve the dispute without need for litigation." [DE #58, p.4].

"The Plaintiff need not avail itself of every form of communication, telephone, certified mail and others, to be

regarded as having attempted a pre-suit resolution of this dispute.” [DE #58] at p.4

The court's conclusion that the plaintiff “need not avail itself” of such communications is accompanied by no explanation as to (1) why this would be reasonable in the factual context of the case at hand; or (2) whether encouraging a plaintiff to avail itself in such communications would further the Copyright Act’s interests. *Cf. Lil' Joe Wein Music, Inc. v. Jackson*, 2008 U.S. Dist. LEXIS 112730 at *16 (S.D. Fla. June 6, 2008)(“the inadequacy and/or non-existence of Plaintiff's investigation . . . strongly indicates that Plaintiff's case was objectively unreasonable, and that Defendants should be awarded attorney's fees.”) Similarly, the Court provided no reasoning for ostensibly determining that it would not be in the Copyright Act’s interests to deter Malibu Media (1) from declining to send an email or letter to a defendant prior to filing suit; or (2) from unreasonably delaying in obtaining evidence and filing suit.

Moreover, rather than explaining why it believes considerations of compensation and deterrence weigh in the Malibu Media’s favor, the court simply stated that “consideration of compensation and deterrence under the Copyright Act ‘are inextricably intertwined with the reasonableness or frivolousness of the [p]arties’s positions, as well as their motivation in litigating the dispute.” [DE #53, p.11]. The Court’s assessments of “reasonableness”, “frivolousness”, and “motivation” were not, however, weighed in relation to the Copyright Act’s

interests. As a result, the court's reasoning was merely tautological. For these reasons, Defendant submits that the lower court erred in failing to focus its inquiry on or otherwise explained how its decision was rooted in the Copyright Act's interests. *See e.g., Casella v. Morris*, 820 F.2d at 367 (remanding to the district court as its decision was not accompanied by reasoning tying the ruling to "the policies of the law that are being enforced, as informed by the court's familiarity with the matter in litigation and the interest of justice").

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY RELYING ON CLEARLY ERRONEOUS FINDINGS OF FACT

Even if the district court were deemed to have applied the correct legal standard, a review of its analysis makes it apparent that it abused its discretion by relying on manifestly incorrect and unsupported "findings" of fact. Specifically, in deciding whether to grant an award of fees, a court must consider the entire record, including conduct during discovery and evidence (or lack thereof) presented during the course of the litigation to support the plaintiff's contentions. *Amadasun v. Dreamworks, LLC*, 359 F. Supp. 2d 1367, 1376 (N.D. Ga. 2005). "[T]he Court must consider the clarity of the law, as well as the record evidence, measured from the time, or times, at which Plaintiff raised or pressed the claim at issue." *Oravec*, 2010 U.S. Dist. LEXIS 32390 at *21-23, n.15; *see also Jenkins v. Jury*, 2009 U.S. Dist. LEXIS 10297, at **6-9 (M.D. Fla. Feb. 2, 2009) (noting that the plaintiff was on notice at the defendant's deposition that he had no claim against defendant and

should have voluntarily dismissed defendant from the case); *Baker v. Urban Outfitters*, 431 F.Supp.2d 351, 359 (S.D.N.Y. 2006) (finding the plaintiff's "continuing pursuit of this case in the quest for a quarter of a million dollars was unreasonable.")

In reaching its decision, the lower court made several critical errors regarding the underlying record. The Report and Recommendation, adopted by the district court, failed to provide any temporal context to the Plaintiff's actions. For instance, it offers the following succinct summary of Plaintiff pre-suit investigation:

"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. 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 #53, P.8](internal citations omitted.)

This completely fails to account for the fact that ten (10) of Plaintiff's "copyrighted movies" did not exist on the date Plaintiff obtained its subpoena. See [DE #1-2]. The court made several other statements that made it apparent that it failed to actually consider the evidentiary record. For instance, without providing any explanation, the court unilaterally discounted the importance of distinguishing between "static" and "dynamic" IP Addresses:

“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.” [DE #58, p.5-6.]

The district court concluded that “there should be no dispute that Plaintiff’s claims were not frivolous at the commencement of this lawsuit.” [DE #53], p.9. This conclusion was accompanied by no discussion of the evidentiary basis that Malibu Media relied upon in filing suit. Instead, the court noted that:

“[T]he presiding district judge determined at the motion to dismiss stage that Plaintiff had stated a prima facie case for copyright infringement.” [DE #53]

A finding that Plaintiff alleged the bare elements of a claim did not constitute – and does not obviate the need for -- an assessment of whether the Plaintiff actually possessed any factual support for its claims at the time it filed the action. Specifically, “validity will not be assumed . . . [w]here other evidence in the record casts doubt on the question.” *Hermosilla*, 2011 U.S. Dist. LEXIS 156499 at *11-12 (quoting *Utopia Provider Systems, Inc. v. Pro-Med Clinical Systems, L.L.C.*, 596 F.3d 1313, 1319 (11th Cir. 2010)). Similarly, the court states that:

“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 an original work under the Copyright Act.” [DE #53], p.7

Defendant did, however, contest Malibu Media's evidence of "access." A plaintiff must prove (1) ownership of a valid copyright; and (2) the copying of original elements of that work. *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). However, if a plaintiff lacks direct evidence of a defendant's copying it must also provide evidence that a defendant had access to the copyrighted works. *See Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1246-48 (11th Cir. 1999). A defendant's access to the work "may not be inferred through mere speculation or conjecture" or proven by relying on evidence that creates only a "bare possibility" that the defendant had access to a work 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.02[A] (2007) ("There must be a reasonable possibility . . . not a bare possibility.")

Malibu Media does not have direct evidence that an individual initiated an infringing download. Instead, its claims against individuals are prefaced on technological data that it believes can prove a defendant's access to the infringing work. It stands to reason, then, that the validity of Malibu Media's initial claims against Mr. Pelizzo (and the reasonableness of its continued pursuit of the action for seven months) can be determined only by assessing Malibu Media's actions in relation to the evidence it was relying upon. The record reflects that Defendant repeatedly drew the court's attention to evidence discounting the possibility that Mr. Pelizzo could have accessed and, therefore, copied the work. Accordingly, the

district court abused its discretion by omitting any discussion of “access” in its assessment (and, in turn, discounting any discussion of critical pieces of evidence in the record.)

The court also noted:

“[I]t 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.” [DE #53], p.9. [internal citations omitted].

This logic --- which suggests that a plaintiff with a valid claim against *someone* is free to indiscriminately bring that claim against *anyone* -- is manifestly erroneous. The existence of a valid claim in the abstract does not automatically make *every* action asserting those claims non-frivolous. As shown in the examples above, the lower court abused its discretion by failing to consider evidence on the record regarding the knowledge and evidence that Plaintiff relied upon in filing its actions. Instead, the court inappropriately accepted the veracity of Malibu Media’s self-serving statements. What’s missing, of course, is any assessment of the *evidence* backing up these representations. *See United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009) (noting that “statements and arguments of counsel are not evidence”); *United States v. Peterson*, 414 F.3d 825, 827 (7th Cir. 2005) (“The lawyer’s affidavit, being hearsay, is no evidence at all.”) Consequently, Defendant submits the court abused its discretion by failing to properly examining the

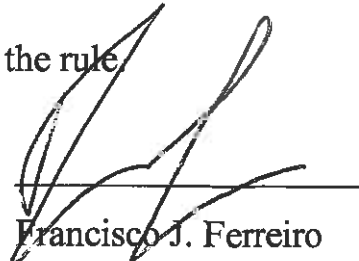
evidentiary record to determine whether Malibu Media's actions against Mr. Pelizzo were frivolous and/or reasonable

CONCLUSION

For the reasons discussed above, Defendant respectfully requests that this Court vacate the district court's March 28, 2014 denial of Defendant's 17 U.S.C. § 505 fee petition.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B) because the Brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman font. This Brief contains 6,706 words, excluding those portions of the Brief exempted under the rule.




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CERTIFICATE OF SERVICE

I certify that on August 6, 2014, an original and six copies of this Brief were sent via First Class Mail, postage prepaid to the Clerk of this Court; and that one copy of this Brief was sent via First Class Mail, postage prepaid to:

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