

Case No. 14-11795-AA

**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**

APPELLEE'S BRIEF

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Case No. 14-11795-AA
Malibu Media, LLC v. Leo Pelizzo

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

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), counsel for Appellees Malibu Media, LLC certify that the following is a 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 this matter, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Ferreiro, Francisco J., *Attorney for Defendant/Appellant*
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3. Field, Collette, *Owner of Malibu Media, LLC*
4. Kennedy, Emilie, *Attorney for Plaintiff/Appellee*
5. Lipscomb, Eisenberg & Baker, P.L., *Attorney for Plaintiff/Appellee*
6. Lipscomb, M. Keith, *Attorney for Plaintiff/Appellee*
7. Malibu Media, LLC, *Plaintiff/Appellee*
8. Malloy & Malloy, P.L., *Attorney for Defendant/Appellant*
9. Pelizzo, Leo, *Defendant/Appellant*
10. Seitz, the Honorable Patricia A., *Presiding District Judge*

Case No. 14-11795-AA
Malibu Media, LLC v. Leo Pelizzo

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1, Appellee, Malibu Media, LLC, has neither a parent corporation nor a publically held corporation that owns more than 10% of its stock.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff 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. Plaintiff 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 ISSUES

- 1) Whether the district court properly exercised its discretion in denying Defendant's motion for attorney fees under the Copyright Act, 17 U.S.C. § 505 when it considered "bad faith" as part of its *Fogerty* analysis.
- 2) Whether the District Court properly exercised its discretion in denying Defendant's motion for attorney fees under the Copyright Act, 17 U.S.C. § 505 because under *Fogerty*, there is no presumption entitling Defendant to fees.
- 3) Whether the District Court properly exercised its discretion in denying Defendant's motion for attorneys' fees under the Copyright Act, 17 U.S.C. § 505 in light of the Copyright Act's goals.
- 4) Whether the findings of the District Court amount to "clearly erroneous" findings of fact that prevented the District Court from properly exercising its discretion in denying Defendant's motion for attorneys' fees under the Copyright Act, 17 U.S.C. § 505.
- 5) Whether the Eleventh Circuit can properly consider Defendant's "access" argument, as this was not an argument presented to the District Court.

STATEMENT OF THE CASE

Pelizzo and his counsel are examples of litigants who don't know how to quit when they're ahead. The underlying case involved Malibu's efforts to protect

its creative works and valuable copyrights from massive online infringement. Malibu produces its own content, invests millions in its production and promotion, and has been found by the federal judiciary to be anything but a copyright “troll.”¹ Malibu polices its works using online infringement detection methods of the highest reliability, which are also relied upon by law enforcement. It is using these methods that Malibu detected multiple and persistent online infringements of its works emanating from a particular IP address that was correlated to Pelizzo.

Pelizzo contested this correlation, however, and Malibu set out to gather the facts necessary to prove or disprove same. In the meantime, Malibu advised Pelizzo and his counsel not to spend money on the case, and even went so far as to draft a Rule 26(f) report and motions for extensions of time to respond to Malibu’s complaint on Pelizzo’s behalf. The idea was simple: a deposition of Pelizzo’s Internet service provider (“ISP”) would determine the validity of the correlation, after which the case against Pelizzo would or would not be dismissed.

¹ See *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779, 780-81 (E.D. Pa. 2013) (“I emphasize that Malibu is *not* what has been referred to in the media and legal publications, and in the internet blogosphere, as a “copyright troll”—i.e., a non-producer who merely has acquired the right to bring lawsuits against alleged infringers. Rather, Malibu is an actual producer of adult films and owns valid copyrights, registered with the United States Copyright Office, in its works.”).

The deposition revealed that an error in correlation had in fact occurred through no fault of Malibu or its detection methods, but as a result of Pelizzo's building mislabeling a port on a group modem. At this point, and as the parties had agreed, Malibu then moved to dismiss the case against Pelizzo. This should have brought an end to these proceedings in a fair and efficient manner.

Not content with this outcome, however, and proving the old adage that "no good deed goes unpunished," Pelizzo then initiated the instant campaign of demanding attorneys' fees and costs far in excess of what any litigant would have expended during the brief proceedings at issue. What resulted was a gross multiplication of proceedings from what should have been a simple dismissal into what now encompasses: a five-hour mediation centered on the issue of fees; extensive motion practice concerning fees before the district court, resulting in a fair and well-reasoned Report and Recommendations by the Magistrate Judge that included a reasonable fee award, based on the admittedly rash reaction of Malibu's counsel to Pelizzo's unreasonableness, which resulted in an extension of proceedings for a brief period of time; and still more objections raised to the R & R by Pelizzo, and further proceedings thereon, resulting in an opinion by the District Court Judge overruling all of Pelizzo's objections.

Ever the sore winner, however, Pelizzo now presses the issue further, filing the instant appeal and rearguing the same meritless arguments or, in many

instances, attempting to raise new ones on issues that were appropriately laid to rest in the district court. This is a textbook example of how a litigant and his counsel can unreasonably and vexatiously multiply judicial proceedings, and is sanctionable. *See Limerick v. Greenwald*, 749 F.2d 97, 101 (1st Cir. 1984) (“When an attorney fails to take an objective look at his case and appeals simply because the rules allow him to appeal, he commits a wrong against the courts and against the parties who must respond to his appeal.”).

Lest we take our eyes off the ball, the case against Pelizzo was dismissed, and he was awarded fees below. Pelizzo’s appeal is entirely without merit, and the district court’s order should be affirmed. *See Bonfiglio v. Nugent*, 986 F.2d 1391, 1394 (11th Cir. 1993) (“Flagrant abuse of the judicial process can enable one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.”).

STATEMENT OF FACTS

A. Malibu Media Filed This Suit in Good Faith and With a Proper Purpose

1. Malibu is Being Damaged by BitTorrent Copyright Infringement

According to GQ Magazine, Malibu produces “perhaps the world’s most sophisticated cinema erotica.”² To do so, it spends over two million dollars a year producing content, and millions more each year to run its business. Doc 47-1, Pg 2.

² *See* <http://www.gq-magazine.co.uk/girls/articles/2013-03/13/brigham-colette-field-x-art-sex-scene>

Malibu cannot compete against free copies of its works. So, on June 10, 2013, Malibu became the first Plaintiff to ever try a BitTorrent copyright infringement case.³ *Id.* at 4. The “Bellwether” case ended with final judgments in Plaintiff’s favor against all three defendants. *Id.* “The evidence . . . Malibu presented was persuasive that it had suffered real damages . . . [from] BitTorrent infringement.” *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 2013 WL 3038025, *8 (E.D. Pa. June 18, 2013). Each month, approximately 80,000 U.S. residents use BitTorrent to steal Malibu’s movies. *Id.* at 2.

2. Malibu Makes Substantially All of Its Money Through Subscription Sales

Malibu distributes its product through a subscription based website, www.x-art.com. *Id.* It makes the *overwhelming* majority of its revenue and profit from subscription sales. *Id.* Its litigation efforts are aimed at deterring infringement and obtaining reasonable compensation *from infringers*. *Id.* at 3. Malibu has no desire to settle with innocent subscribers. *Id.* Courts notice: “moreover, the Court has personally observed Plaintiff’s willingness to settle and/or dismiss cases without payment of *any damages* where the defendant has come forward with exculpatory evidence.” *Malibu Media, LLC v. John Doe*, Civil Action No. 13-CV-00307, CM/ECF 36, at p. 5, (D. Colo. 2013) (emphasis in the original). “I emphasize that

³ See Doc 47-2, Pg 1 for instructions to download the audio recording of the trial. The testimony contained in the audio recording is hereby made a part of the record.

Malibu is not what has been referred to in the media and legal publications, and in the internet blogosphere, as a ‘copyright troll’.” *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 2013 WL 3038025, *1 (E.D. Pa. 2013). Further, “many internet blogs commenting on this and related cases ignore the rights of copyright owners to sue for infringement, and inappropriately belittle efforts of copyright owners to seek injunctions and damages.” *Id.* at n.1.

3. IPP Technology Has Been Independently Tested And Works

A computer investigations expert, Patrick Paige, independently tested IPP’s IP Address detection method and concluded that it works. *See* Doc 47-3. A summary of how IPP’s people, software and hardware work is set forth in the declarations of Tobias Feiser and Michael Patzer. *See* Doc 47-4 and Doc 47-5. Countless defendants have admitted liability. From the above, Malibu knows IPP, correctly identifies infringers’ IP Addresses.

4. The Subject IP Address Was Used By A Serial Infringer

At the time Plaintiff filed this case IPP detected the infringer stealing 14 movies a total of 337 times. *See* Doc 47-6, Pg 1. By January 2013, when the infringement stopped, the infringer had stolen 25 movies and been detected a total

of 549 times.⁴ *Id.* From Plaintiff's perspective, this suit was aimed at one of its worst infringers.

5. ISPs' Correlations Are Almost Always Accurate

This is the first and only case where Malibu's counsel believes an ISP made a correlation error. *Id.* Undersigned has personally been assured by *numerous* ISPs that their lookups are accurate and reliable. *Id.* Comcast which, like Hotwire, is a major ISP, testified through its 30(b)(6) representative that it was "absolutely certain" that its correlation was correct. In another matter, Hotwire testified that it takes its responsibility to correlate an IP Address to a subscriber seriously and that it uses the same procedure to perform a correlation for Malibu that it uses in a criminal case. *See* Doc 47-7. In the approximately 200 instances where former Palm Beach Detective Patrick Paige supervised or directly performed the investigation of a criminal matter involving a computer and the Internet, he never encountered an ISP correlation error. Doc 47-3, Pg 4. And, after executing the search warrants based upon the ISPs' correlations, in all but one instance, the police officers found the evidence.⁵ *Id.* In short, prior to filing suit there was no reason to suspect a correlation error because they are exceedingly rare anomalies.

⁴ The infringer likely moved. Indeed, in 2013, after the infringement stopped, Plaintiff could not find another Miami Hotwire subscriber committing as much infringement. *Id.*

⁵ In that one instance, a next door neighbor was using the subscriber's open WiFi.

6. Hotwire Communications Said It Assigned the Subject IP Address to Defendant

In response to a subpoena, Hotwire identified Mr. Pelizzo as the subscriber of the internet being used to infringe. *See* Doc 47-8. The subpoena was authorized after a hearing in a Pure Bill of Discovery proceeding. *See* Doc 47-9. Hotwire complied with the Cable Communications Act by notifying Defendant of the subpoena.⁶ *See* Doc 47-10, Pg 2. Upon receipt, Defendant did not – but could have – called Hotwire to advise that his condo was unoccupied. Had he done so, Hotwire may have investigated or refrained from disclosing his identity.

7. Prior to Filing Suit, Plaintiff Attempted to Contact Defendant Numerous Times

Prior to filing this suit, during the pendency of the Bill of Discovery suit, Plaintiff attempted to contact Defendant on April 6, 2012, April 10, 2012, April 17, 2012, May 21, 2012, June 4, 2012, and August 14, 2012 via telephone. Doc 47-6, Pg 1. Defendant did not respond and the subject IP Address continued to infringe at an alarming rate. Had Defendant responded, Plaintiff would have deposed Hotwire and Defendant's building in the Bill of Discovery suit. Significantly, Defendant hired Malloy & Malloy, PA prior to being served. *See* Doc 47-10 and

⁶ Hotwire's Subpoena Response noted: "Leo Pelizzo is an Account Holder. Hotwire does not maintain [records of] individual users of Internet." *Id.* All this means is that Hotwire does not know who used its subscriber's Internet service. No ISP can know that.

Doc 6. This raises the presumption Defendant was unreasonably ignoring the dispute.

8. Plaintiff Had a Proper Purpose to File Suit

Malibu sued to: (a) enjoin the *infringer*; (b) seek compensation from the *infringer*; and (c) deter future infringement by others. These are reasonable and justifiable bases to sue.

B. Plaintiff Acted Reasonably And Defendant Acted Unreasonably

1. Without First Talking to Plaintiff, Defendant Drafted a Frivolous 12(b)(6) Motion

Instead of calling undersigned to say: “You’ve got the wrong guy. My client was out of the country and his condo was empty” – which is what a reasonable and cost-conscious lawyer’s first move would be – on September 21, 2012, Defendant filed a frivolous 12(b)(6) Motion. *See* Doc 7. It was unnecessary because a simple verified answer and defenses would have communicated that Defendant was out of the country and his condo was empty.⁷ It was frivolous because scores of identical Rule 12(b)(6) motions have been *universally* rejected.

⁷ Defendant also could have asked Plaintiff to stipulate to a motion to amend the Complaint and allow him to proceed anonymously. Plaintiff would have agreed. Doc 47-6, Pg 2. Indeed, Plaintiff has allowed other defendants to proceed anonymously even after naming them. *Id.*

2. Right Away, Plaintiff Advised Defendant It Would Not Push For A Settlement

Based on Defendant's declaration, it appeared likely that Hotwire had made a correlation error. So, on October 11, 2012, undersigned sent defense counsel an e-mail advising him that "we do not want to push this case against a person who was not the downloader nor do we expect a non-infringer to settle Figuring this out [what happened] as inexpensively and expeditiously as is possible is in both of our clients' best interests. I would like to teleconference with you toward this end." *See* Doc 47-12, Pg 1.

3. Malibu Advised Defendant NOT to Spend Money On this Matter; And, That After Hotwire's Deposition Defendant Would Likely Be Dismissed

During counsels' *first* teleconference, on October 23, 2012, undersigned urged opposing counsel NOT to spend money, and advised that Malibu did not intend to proceed after the Hotwire deposition:

During our conversation, I urged you to advise your client not to spend money on this process. Presently, we do not intend to pursue this matter past the deposition of Hotwire unless we get confirmation from Hotwire that your client is the correct subscriber. And, thereafter we will only pursue it if we can explain why infringements occurred when he was out of town.

See Doc 47-13, Pg 1.

4. Malibu Had a Proper Purpose For Deposing Hotwire

Malibu deposed Hotwire for two reasons: (a) to ascertain if and how the correlation error occurred; and (b) to determine if it would be possible to identify the infringer. Doc 47-6, Pg 2.

5. To Reduce Defendant's Fees Plaintiff Did Defendant's Work

To reduce Defendant's fees, Plaintiff drafted the Rule 26(f) Report. *Id.* And, both motions to enlarge the time within which *Defendant* had to respond to the Complaint. *Id.*

6. Plaintiff Scheduled Hotwire's Deposition to Coincide with Other Depositions

Hotwire's deposition was rescheduled for March 13, 2013 to coincide with four other depositions undersigned took in another matter near Philadelphia. *Id.*

7. Plaintiff Learned How and Why Hotwire Made a Correlation Error

Hotwire's 30(b)(6) deponent testified that the *only* way she was aware that a correlation error could occur was if a port on the group modem on Defendant's floor was mislabeled. Doc 38-1, Pg 39-50.⁸

⁸ To explain, the individual units in Defendant's building do not have modems provided by Hotwire. Instead, the modem for a floor is in a utility closet for that floor. And, wires from that modem's ports are run to the resident's individual units. A "mislabeled port" would cause Hotwire to identify Defendant instead of the infringing neighbor on his floor. *See* p. 39, lines 3-12. *See also* Doc 38-1, Pg 49-50

8. Plaintiff Offered to Voluntarily Dismiss Defendant Immediately After the Hotwire Deposition

Immediately after the Hotwire deposition, undersigned offered to voluntarily dismiss his client with prejudice. Doc 47-6, Pg 2. The offer was contingent on mutual releases. *Id.*

9. Defendant Unreasonably Demanded \$17,500 in Attorneys' Fees

On March 21, 2013, in response to the walk-away offer, Defendant demanded \$17,500 for attorneys' fees. *See* Doc 47-14, Pg 1. *Shocked* by the clearly excessive fees and admittedly peeved, within a half hour, undersigned replied with two knee-jerk e-mails: (a) rejecting the demand and (b) indicating Plaintiff would pursue the case. Doc 41-2, Pg 1-2. Simultaneously, paralegals were instructed to propound discovery. *Id.* Undersigned cooled quickly. And, at the mediation less than two weeks later, undersigned again advised Defendant that Malibu would be dismissing the case. Doc 47-6, Pg 2.

10. The Mediation Focused On How Much Plaintiff Would Pay in Fees

On April 4, 2013, the parties attended mediation. Doc 47-6, Pg 2. The focus of all the negotiations was on how much Plaintiff would pay in fees. *Id.* Significantly, undersigned did not and does not believe Defendant is entitled to *any* fees, but Malibu made offers genuinely attempting to compromise. *Id.* Significantly, Malibu *never* demanded money from Defendant. *Id.*

11. Malibu Offered \$13,000 for Fees

Shortly after the mediation, on April 11, 2013, Malibu offered \$13,000 for fees. *See* Doc 47-15. The offer was orally conditioned on Defendant allowing Plaintiff to take the 30(b)(6) deposition of the building so that Plaintiff could identify the infringer. Defendant responded that he would not take anything less than full reimbursement of fees and costs. *See* Doc 47-16, Pg 1. At that time, Defendant had advised Plaintiff that his fees and costs equaled \$24,000. *See* Doc 47-17, Pg 1.

12. Defendant Would Not Stipulate to Being Voluntary Dismissed With Prejudice

Resolved to fighting clearly excessive fees, Malibu requested that Defendant stipulate to being dismissed with prejudice. *See* Doc 47-18. Defendant refused and drafted a significant opposition to Plaintiff's motion to voluntarily dismiss him with prejudice. Significantly, Plaintiff had indicated Defendant would be the prevailing party and would have so stipulated. *See* Doc 37.

13. Defendant's Continuing Quest for Excessive Fees

Over a year ago, on July 1, 2013, Defendant filed his motion seeking attorneys' fees and cost pursuant to 17 U.S.C. § 505, 28 U.S.C. § 1920, and 28 U.S.C. § 1927. *See* Doc 41. Plaintiff's response and various sur-replies followed. *See* Docs 47, 49, 50 and 52. In February of 2014, the Honorable Andrea M. Simonton, Magistrate Judge, issued her Report and Recommendation, wherein she

denied Defendant's request for fees pursuant to 17 U.S.C. § 505. *See* Doc 53, Pg 12. However, she did award Defendant \$6,815.50 in attorneys' fees pursuant to 28 U.S.C. § 1927. *Id.* at 16.

Yet, unsatisfied with this number, Defendant decided to file an objection with the district court. *See* Doc 53. This time, the Honorable Patricia Seitz, District Court Judge, again denied Defendant's request for fees pursuant to 17 U.S.C. § 505. *See* Doc 58, Pg 6. Judge Seitz, instead, affirmed and adopted Judge Simonton's Report and Recommendation, and again awarded Defendants \$6,815.50 in fees pursuant to 28 U.S.C. § 1927. Yet, still unsatisfied, Defendant continues his quest for fees by filing the subject appeal. Instead of accepting Malibu's offer to pay \$13,000 in fees on April 11, 2013, Defendant has prolonged this litigation for over a year in his unrelenting request for excessive fees.

STATEMENT OF REVIEW

Section 505 of the Copyright Act provides: "[i]n any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party ... [T]he court may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. "Under this statute, attorney's fees are at the court's discretion." *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 754 (11th Cir. 1997). "In reviewing a district court's decision to grant or deny fees under the Copyright Act, we first determine whether 'the district court

weighed the relevant factors and exercised its discretion.” *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 198 F.3d 840, 842 (11th Cir. 1999) citing *Montgomery v. Noga*, 168 F.3d 1282, 1303 (11th Cir.1999). “If the district court weighed the proper factors, then ‘we will not question the court’s decision to grant or deny fees absent an abuse of that discretion.’” *Id.* “As we have observed, the abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment we will not reverse even if we would have gone the other way had the choice been ours to make.” *McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001).

SUMMARY OF THE ARGUMENT

The district court carefully reviewed each of the *Fogerty* factors and properly exercised its discretion when denying Pelizzo’s motion for attorneys’ fees under 17 U.S.C. § 505 of the Copyright Act. Under *Fogerty*, fees are to be awarded “only as a matter of the court’s discretion,” and in making this determination, 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.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (citation omitted). 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.” *Id.*

Applying these factors to the case, the district court correctly found that all factors weigh in favor of Malibu. These findings are fully supported by the record. Accordingly, Pelizzo’s arguments to the contrary are without merit. Indeed, the district court’s analysis was faithful to the purpose of the Copyright Act, the Eleventh Circuit does not hold a presumption in favor of Defendant, and the district court did not err by considering factors such as “bad faith” and “frivolousness.”

Further, the district court did not abuse its discretion because the record demonstrates it accurately analyzed the temporal context of the case and considered the difference between a static and dynamic IP address. Finally, Pelizzo’s “access” argument is meritless. First, Pelizzo failed to raise his “access” argument in the district court and should be precluded from doing so now, for the first time on appeal. His “access” argument also fails to consider the record, which found Malibu stated a plausible claim for copyright infringement and had a reasonable basis to rely on the records provided by Pelizzo’s Internet Service Provider.

For all of these reasons, the district court’s denial of attorneys’ fees to Pelizzo was well analyzed under applicable Supreme Court precedent and was a

proper exercise of the district court's discretion. Plaintiff respectfully suggests that the district court's order should be affirmed.

ARGUMENT

I. The District Court Properly Analyzed the *Fogerty* Factors and Ruled that Defendant is Not Entitled to a Fee Award

A. The Court Properly Considered the Purposes of the Copyright Act

Pelizzo's argument that the district court failed to consider whether awarding attorneys' fees would further the purposes of the Copyright Act is nonsensical and meritless given the district court's careful application of the *Fogerty* factors. Under *Fogerty*, fees are to be awarded "only as a matter of the court's discretion," and in making this determination, 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." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (citation omitted). 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." *Id.*

Consistent with the foregoing, the parties to this case argued and briefed each of the four *Fogerty* factors at length in the district court. Subsequently, the district court evaluated and balanced the factors, and determined that "all of the *Fogerty* factors support denying attorney's fees in this case." [Doc 53, Pg 4]. In

so ruling, the district court noted that its determination was “[c]onsistent with other courts on similar facts,” and cited to the case of *Virgin Records America, Inc. v. Thompson*, 512 F.3d 724, 726 (5th Cir. 2008) as support for its determination. As the district court did here, the court in the *Thompson* opinion evaluated and balanced the same *Fogerty* factors under similar facts, and denied an award of fees. *Id.*

The district court’s careful application of the *Fogerty* factors to the parties’ claims and defenses is what kept its determination “faithful to the purposes of the Copyright Act.” *See Mitek Holdings, Inc. v. Arce Eng’g Co.*, 198 F.3d 840, 842-43 (11th Cir. 1999) (“The touchstone of attorney’s fees under § 505 is whether imposition of attorney’s fees will further the interests of the Copyright Act, i.e., by encouraging the raising of objectively reasonable claims and defenses, which may serve not only to deter infringement but also to ensure ‘that the boundaries of copyright law [are] demarcated as clearly as possible’ in order to maximize the public exposure to valuable works.”), *quoting Fogerty*, 510 U.S. at 526-27; *Diamond v. Am-Law Publ’g Corp.*, 745 F.2d 142, 147 (2d Cir. 1984) (holding that the “principle purpose of the [Copyright Act] is to encourage the origination of creative works by attaching enforceable property rights to them.”).

It follows from the above that “the imposition of a fee award against a copyright holder with an objectively reasonable litigation position will generally

not promote the purposes of the Copyright Act.” *Luken v. International Yacht Council, Ltd.*, 581 F.Supp.2d 1226 (S.D. Fla. 2008) (emphasis added), *quoting* *Matthew Bender & Co. v. West Publ’g Co.*, 240 F.3d 116, 121-22 (2d Cir. 2001). Here, the district court specifically found Plaintiff’s litigation position to be reasonable [Doc 53, Pg 10-12], thus making an award of fees under § 505 contrary to the purposes of the Copyright Act.

Given the foregoing, the argument raised by Pelizzo that the district court “completely failed” to assess the evidentiary record in relation to the Copyright Act’s interests makes no sense. For example, the issue of whether Malibu’s phone calls to Pelizzo were sufficient to demonstrate a good faith attempt to resolve the dispute short of litigation were clearly briefed to, and evaluated by, the district court. *See* Doc 53 and Doc 58.

Further, Pelizzo’s reliance on the Southern District of Florida’s opinion in *Oravec* which states, “although attorneys’ fees are awarded in the trial court’s discretion, they are the rule rather than the exception and should be awarded routinely” is misplaced. *Oravec v. Sunny Isles Luxury Ventures L.C.*, 04-22780-CIV, 2010 WL 1302914 (S.D. Fla. Mar. 31, 2010). Indeed, in *Oravec*, after analyzing the *Fogerty* factors, the court only found attorneys’ fees were warranted *after* the plaintiff’s conduct was “objectively unreasonable.” *Id.* at *9 (“[I]n an effort to deter the prosecution of unreasonable claims, the Court shall award

Defendants all reasonable attorneys' fees incurred to defend against the 2002 and April 2004 Copyright claims, from May 4, 2005 (the latest date on which these claims became objectively unreasonable) through August 1, 2006 (the entry of final judgment)."). This ruling is consistent with the holding of the Report and Recommendation here, which found that Malibu's pursuit of its claims was objectively reasonable but awarded Pelizzo partial fees under § 1927. Doc 53, Pg 16.

Likewise, the Fifth Circuit noted that "an award of attorney's fees to the prevailing party in a copyright action is 'the rule rather than the exception and should be awarded routinely.'" *Virgin Records Am., Inc. v. Thompson*, 512 F.3d 724, 726 (5th Cir. 2008). But in *Virgin Records*, the Fifth Circuit upheld the district court's opinion denying fees in a nearly identical case, holding that "[t]hese Plaintiffs should not be deterred from bringing future suits to protect their copyrights because they brought an objectively reasonable suit." *Id.*

In this case, the Report and Recommendation cited to the above opinion when balancing the *Fogerty* factors. Doc 53, Pg 12. Indeed, courts in the Eleventh Circuit have long held that, "[i]t is not a goal of the Copyright Act to deter litigants from bringing potentially meritorious claims, even though those claims may be ultimately unsuccessful. Therefore, an award of attorney's fees to Defendants here

would not further the goals of the Copyright Act.” *Thompkins v. Lil’ Joe Records, Inc.*, 02-61161-CIV, 2008 WL 896898 (S.D. Fla. Mar. 31, 2008).

B. The Eleventh Circuit Does Not Hold a Presumption in Favor of the Defendant

1. Pelizzo’s Argument Applies the Wrong Law

Pelizzo’s argument that the district court was required to apply a presumption in favor of Defendant when determining fees is clearly wrong and frivolous under applicable law. Pelizzo extrapolates this “requirement” from cases that rely on non-binding, minority opinions and that are otherwise distinguishable. The argument also ignores the clear weight of decisional authority on the issue, in which courts in every Circuit save the Seventh Circuit—and including the Eleventh Circuit—have held that no presumption in favor of copyright defendants exists. “[T]he 7th Circuit presumption in favor of awarding fees to a prevailing defendant is non-binding authority.” *Klein & Heuchan, Inc. v. CoStar Realty Info., Inc.*, 8:08-CV-1227-T-30EAJ, 2011 WL 6097980 (M.D. Fla. Dec. 7, 2011). “[I]n this particular case there is no need to award fees in order to deter nuisance suits as this Court has already found that [plaintiff’s] claims were brought in good faith and were neither frivolous nor objectively unreasonable.” *Id.*

The cases cited by Pelizzo for the proposition that a presumption in favor of prevailing defendants exist are all inapposite, distinguishable or both. The cases are inapposite because they rely on reasoning from the Seventh Circuit, or pre-

Fogerty decisions, which have been rejected in all other Circuits and by the Supreme Court. For example, Defendant relies on the decision of *Lil' Joe Wein Music, Inc. v. Jackson*, 2008 WL 2688117 (S.D. Fla. 2008) for the argument that a strong presumption in favor of awarding fees exists when a defendant is a prevailing party. The *Jackson* decision, however, is based on Seventh Circuit case law not controlling or persuasive in this Circuit, and is otherwise based on a pre-*Fogerty* decision of the 11th Circuit. *Id.* citing *Woodhaven Homes & Realty, Inc. v. Hotz*, 396 F.3d 822, 824 (7th Cir.2005); accord *Casella v. Morris*, 820 F.2d 362, 366 (11th Cir.1987).

Defendant's cases are also distinguishable because they all deal with cases of bad faith or questionable conduct, which has not been found here. *See, e.g., Oravec v. Sunny Isles Luxury Ventures L.C.*, 04-22780-CIV, 2010 WL 1302914 (S.D. Fla. Mar. 31, 2010) (awarding fees only after the claims became unreasonable); *Bait Prods. Pty v. Wallis*, 2013 U.S. Dist. LEXIS 148913 (M.D. Fla. Sept. 27, 2013) (awarding fees to BitTorrent copyright plaintiff against willful infringer through default judgment); *Lil' Joe Wein Music, Inc. v. Jackson*, 06-20079-CIV, 2008 WL 2688117 (S.D. Fla. July 1, 2008) ("Plaintiff's motivation in filing this case was at least questionable, if not improper or in bad faith"); *Hermosilla v. Coca-Cola Co.*, 10-21418-CIV, 2011 WL 9364952 (S.D. Fla. July 15, 2011) (incontrovertible evidence and binding circuit law made plaintiff's

claims objectively unreasonable); *Corwin v. Walt Disney World Co.*, 2008 U.S. Dist. LEXIS 112545 at *37-38 (M.D. Fla. Mar. 19, 2008) (suit was objectively unreasonable, as plaintiff's motivation was to obtain large judgment from wealthy defendant); *Amadasun v. Dreamworks, LLC*, 359 F. Supp. 2d 1367, 1372 (N.D. Ga. 2005) (the plaintiff did not file an opposition to the fee motion, filed suit without actually owning a copyright to the claimed work, and behavior during discovery was borderline bad faith).

2. A Presumption Conflicts with the Copyright Act Statute, Supreme Court Precedent, and the Purposes of the Copyright Act

The presumption favoring defendants in the Seventh Circuit should not be applied by the district court because it conflicts with the language of the Copyright Act fees statute, conflicts with the principles outlined in *Fogerty*, and creates a chilling effect on plaintiffs that advance reasonable claims, contrary to the purposes of the Copyright Act.

a. *A Presumption in Favor of the Defendant Conflicts with the Copyright Act Fees Statute*

Section 505 of the Copyright Act states that a court, "in its discretion may ... award a reasonable attorney's fee." 17 U.S.C. § 505. Words such as "may" and "in its discretion" leave the decision making authority up to the district court and do not imply a presumption in favor of either party. "[T]o create, as [defendant] asks, a presumption that in a certain type of copyright case a prevailing defendant

should receive attorneys fees as a matter of course would be contrary to the statutory language ... as construed by the Supreme Court and this Court.” *Lava Records, LLC v. Amurao*, 354 F. App’x 461, 462-63 (2d Cir. 2009) (internal citations omitted).

b. A Presumption in Favor of the Defendant Conflicts with the Principles of Fogerty

In *Fogerty v. Fantasy*, the Supreme Court rejected the British rule that the prevailing party should automatically receive fees. “[W]e reject petitioner’s claim that § 505 enacted the British Rule for automatic recovery of attorney’s fees by the prevailing party. Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney’s fees are to be awarded to prevailing parties only as a matter of the court’s discretion.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023, 1033, 127 L. Ed. 2d 455 (1994). “These pronouncements cause this Court to find the presumptive entitlement to attorneys’ fees, to the extent that it favors an award of fees to a prevailing defendant to be inconsistent with *Fogerty*’s command that prevailing plaintiffs and defendants be treated equally in determining whether to award attorneys’ fees.” *ZilYen, Inc. v. Rubber Mfrs. Ass’n*, 958 F. Supp. 2d 215, 219 (D.D.C. 2013) (internal citations omitted). The presumption “appears to conflict with the Supreme Court’s holding in *Fogerty* that fee-shifting is a matter for the district court’s discretion, that prevailing defendants and plaintiffs are to be evaluated ‘alike’ and ‘in an evenhanded manner,’ and that the Copyright Act did

not adopt ‘the British Rule for automatic recovery of attorney’s fees by the prevailing party.’” *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 820 F. Supp. 2d 569, 575 (S.D.N.Y. 2011).

A presumption in favor of awarding defendant fees conflicts with the *Fogerty* rule that plaintiffs and defendants should be treated alike and attorneys’ fees should be granted “only as a matter of the court’s discretion” (emphasis added). A presumption would remove a district court’s discretion and instead impose a rule favoring one party over the other.

c. A Presumption in Favor of the Defendant Creates a Chilling Effect on Parties with Legitimate Claims

Finally, a presumption in favor of the defendant creates a chilling effect on plaintiffs that advance legitimate claims. This cannot possibly be construed to be aligned with the interests of the Copyright Act. “The presumption assuredly deters plaintiffs from attempting to vindicate rights in cases involving novel, complex, or unsettled issues of fact or law. If fee shifting is virtually automatic, plaintiffs would be inclined to exercise their rights in only the most indisputable cases.” William T. McGrath, *Should There Be A Presumption Favoring Awards of Attorney’s Fees in Copyright Litigation?*, 12 J. Marshall Rev. Intell. Prop. L. 630, 643 (2013). Pelizzo argues that Malibu should be liable for his fees as a matter of course, despite Malibu’s good faith belief that his identity had been accurately reported by a third party. Deterring Malibu, or any copyright holder, from bringing good faith

claims for infringement – particularly infringement that occurred at the scale in this case – is not in the interests of the Copyright Act, which expressly grants Plaintiff the right to file suit when its movies have been infringed. *See* 17 U.S.C. § 501(b) (“The legal or beneficial owner of an exclusive right under a copyright is entitled ... to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).

As noted in *Klein*, “the 7th Circuit itself has expressed concern over taxing attorneys’ fees against losing plaintiffs who advance good-faith reasonable claims.” *Klein & Heuchan, Inc. v. CoStar Realty Info., Inc.*, 8:08-CV-1227-T-30EAJ, 2011 WL 6097980 (M.D. Fla. Dec. 7, 2011). Here, a presumption favoring Defendant would deter plaintiffs from vindicating their rights, contrary to the purposes of the Copyright Act.

C. The District Court Correctly Considered Frivolousness and Bad Faith when Analyzing the *Fogerty* Factors

Pelizzo’s argument that the district court erred by considering factors such as “frivolousness” and “bad faith” is misplaced and without merit. First, when analyzing a fee award under § 505, the four factors in *Fogerty* are to be considered as a “guide” and therefore not mandatory, nor all inclusive. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535, 114 S. Ct. 1023, 1033, 127 L. Ed. 2d 455 (1994) (“We agree that such factors may be used to guide courts’ discretion, so long as such factors are faithful to the purposes of the Copyright Act and are applied to

prevailing plaintiffs and defendants in an evenhanded manner.”). Indeed, *Fogerty* notes “[t]here is no precise rule or formula for making these determinations,’ but instead equitable discretion should be exercised ‘in light of the considerations we have identified.’” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023, 1033, 127 L. Ed. 2d 455 (1994).

Second, “frivolousness” actually is a *Fogerty* factor. And, “bad faith” is intrinsically aligned with two additional factors – “objective unreasonableness” and “motivation.” Indeed, considerations of “bad faith” are analyzed in nearly every fee award under § 505 in the Eleventh Circuit. *See e.g. Thompkins v. Lil’ Joe Records, Inc.*, 02-61161-CIV, 2008 WL 896898 (S.D. Fla. Mar. 31, 2008) (“Plaintiff’s argument under *Waterson* was not frivolous, was not raised in bad faith, and raised an issue of first impression in this Circuit”); *Brewer-Giorgio v. Bergman*, 985 F. Supp. 1478, 1482 (N.D. Ga. 1997) (“After careful consideration, the court finds no indication that Plaintiffs brought these claims in bad faith or with any malicious intent” analyzing under *Fogerty*’s motivation factor); *Lil’ Joe Wein Music, Inc. v. Jackson*, 06-20079-CIV, 2008 WL 2688117 (S.D. Fla. July 1, 2008) (“The undersigned ... finds that Plaintiff’s action in dismissing its claims ...indicate questionable good faith ... although the undersigned declines to make an express finding of bad faith”, analyzing under *Fogerty*’s motivation factor); *Major Bob Music v. Stubbs*, 851 F. Supp. 475, 483 (S.D. Ga. 1994) (“the following

factors justified a *denial* of attorney fees to a prevailing plaintiffbad faith on plaintiffs' part in prosecuting the action"); *Dream Dealers Music v. Parker*, 924 F. Supp. 1146, 1154 (S.D. Ala. 1996) (same); *Klein & Heuchan, Inc. v. CoStar Realty Info., Inc.*, 8:08-CV-1227-T-30EAJ, 2011 WL 6097980 (M.D. Fla. Dec. 7, 2011) ("In exercising its discretion to award fees, a court should consider whether the losing party litigated in good or bad faith."). While a finding of bad faith is not necessary for a defendant to receive an award, it certainly remains a factor for consideration when analyzing the *Fogerty* factors.

D. The District Court Did Not Abuse its Discretion by Relying on Erroneous Facts

1. The District Court Accurately Analyzed the Temporal Context of the Case

Pelizzo's argument that the district court failed to examine the "temporal context" of the case is meritless. Both the Report and Recommendation and the district court's opinion carefully examined the record events and progression and found that the "temporal context" weighed in favor of Malibu. *See e.g.* Doc 53, Pg 8 ("These repeated attempts to contact Defendant pre-suit supports a conclusion that Plaintiff's motivation in bringing this suit was proper"); *Id.* ("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”); *Id.* (“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”); *Id.* at 8-9 (“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”); *Id.* at 10 (“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”).

Pelizzo identifies an inconsistency in the Report and Recommendation and notes that Malibu obtained the subpoena identifying Pelizzo before filing suit, Doc 52, Pg 2, but fails to explain how that inconsistency had any bearing or consequence on the outcome of the fee award. *See* Brief at *35. The Eleventh Circuit has disregarded such inconsistencies that have no consequence on the outcome of the case. *See Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1285 (11th Cir. 1990) (“Although the district court incorrectly applied the “arbitrary and capricious” standard to [defendant’s] denial of appellant’s claim, we find this error to be of no consequence.”); *In re Smith*, 91 B.R. 612, 614 (Bankr. M.D. Fla. 1988)

(“[T]his alleged error in the Findings, is of no consequence, and is immaterial and certainly would not warrant changing the ultimate conclusion of this Court”).

2. The District Court Considered Dynamic/Static IP Addresses

Defendant’s argument that the Report and Recommendation failed to consider the impact of a dynamic versus static IP address was aptly characterized by the district court as “unpersuasive.” *See* Doc 58, Pg 5. Indeed, the district court explained, “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.” *Id.* While the IP address may have been dynamic, Malibu’s subpoena to Pelizzo’s ISP stated the exact time that the infringement occurred. At that exact time, whether the IP address was dynamic or not, it was assigned to an account holder which Hotwire represented was Pelizzo. Pelizzo does not explain how the district court’s ruling was incorrect, or otherwise would have changed the outcome of the fee award.

3. Defendant Improperly Raises the New Argument of “Access”

This Court should not consider Pelizzo’s access argument because he failed to raise it at the district court level. The Eleventh Circuit has “repeatedly held that ‘an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.’” *Walker v. Jones*, 10 F.3d 1569, 1572

(11th Cir.1994) (quoting *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991)); *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1222 n. 8 (11th Cir. 2004) (refusing to consider new argument); *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003) (same); *Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000) (same); *Nyland v. Moore*, 216 F.3d 1264, 1265 (11th Cir. 2000) (same); *Provenzano v. Singletary*, 148 F.3d 1327, 1329 n. 2 (11th Cir.1998) (same).

However, because the “power to entertain an argument raised for the first time on appeal is not a jurisdictional one[,] [this Court] *may* choose to hear the argument under special circumstances.” *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004). These special circumstances are when: (1) the new issue “involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice”; (2) “the appellant raises an objection to an order which he had no opportunity to raise at the district court level”; (3) “the interest of substantial justice is at stake”; (4) “where the proper resolution is beyond any doubt”; and (5) “that issue presents significant questions of general impact or of great public concern.” *Id.* None of these circumstances apply to Pelizzo’s access argument.

First, the “access” argument involves questions of fact—not law. Indeed, determining whether Pelizzo reasonably had access to Plaintiff’s infringed works would require raising numerous discovery concerns that were never raised to the

district court; i.e., whether Pelizzo ever utilized the assigned IP address; whether Pelizzo could have continued to participate in a BitTorrent swarm while out of the country; whether the port in Pelizzo's building was properly labeled; whether a Hotwire employee made an error; whether Pelizzo had ever viewed Malibu's moves, etc. "Plainly, as an appellate court with no fact finding mechanism, and, indeed, without any factual averments made in the trial court, we are naturally hesitant to consider this claim." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d at 1331.

Second, Pelizzo failed to make this argument to the district court despite having the opportunity to raise it in his fees motion and in his objection to the Report and Recommendation. "[T]he record strongly suggests that [he] had every opportunity to raise [this] theory before the district court. [He] chose not to do so" *Id.* at 1333. Third, the "access" argument does not put the interests of substantial justice at stake. Indeed, Malibu has completely dropped the copyright infringement claim against Pelizzo—all that remains is this appeal over fees. Whether Pelizzo had access to the copyrighted works is an issue that goes to his liability for copyright infringement, which is moot at this point. Delving into a fact-specific inquiry of liability at this stage cannot be in the interest of substantial justice. Further, "[a]lthough this exception is theoretically broad, . . . as best we

can tell, this Court has never once elected to evaluate a new argument on this basis.” *Id.*

Fourth, the proper resolution of the “access” argument is not beyond any doubt. As discussed above, the argument relies on evidence and testimony that was not before the district court. “Plainly, this is not an easy question.” *Id.* at 1334. Finally, this is not a question of great public concern. Specifically, whether Pelizzo had “access” to the works is a question limited to the circumstances of one person – Mr. Pelizzo. Indeed, “any ruling we would make would likely be inapplicable to any future cases.” *Id.* at 1335.

In short, none of the listed exceptions apply to Pelizzo’s argument. Pelizzo failed to raise it before the district court, and it is not outcome dispositive of his fee award now.

4. Defendant’s Access Argument Ignores the Record

Even if timely raised, Pelizzo’s argument that the district court abused its discretion by “omitting any discussion of ‘access’” is without merit. *See* Brief at *38. “To establish a prima facie case of copyright infringement, ‘two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). “A plaintiff may show copying by demonstrating that the defendants had access to the copyrighted

work and that the works are ‘substantially similar.’” *Dodd v. Woods*, 809-CV-1872-T-27AEP, 2010 WL 2367140 (M.D. Fla. May 14, 2010). “[A]ccess’ requires proof of ‘a reasonable opportunity to view’ the work in question.” *Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1275 (M.D. Fla. 2008) citing *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1249 (11th Cir. 1999).

Here, the record demonstrates that the district court considered whether Malibu pled a plausible claim for copyright infringement and, in doing so, implicitly considered whether Malibu had a reasonable belief that Pelizzo accessed its works at the time it filed its complaint. The district court did not make a specific finding of access because, as set forth above, this argument was never raised before the district court, nor was the case adjudicated on its merits. However, it is undisputed that Hotwire, Pelizzo’s ISP, identified Pelizzo as the owner of the IP address 24.238.22.207 being used to infringe Plaintiff’s movies on BitTorrent. *See* Doc 53, Pg 2, citing Doc 47-8. And, the Report and Recommendation cited to the Hotwire deposition where Hotwire testified that: “[Hotwire’s employee] identified Defendant as the subscriber associated with the IP address, which [Hotwire’s counsel], in turn, provided in a response to the subpoena.” *Id.* at *4 citing Doc 38-1 at *24. At the time the complaint was filed, Malibu had a good faith belief that Pelizzo was the individual who paid for the infringing account. As the person paying for the Internet, he is the most likely user

of his Internet and therefore had a “‘reasonable opportunity to view’ the work in question.” *Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1275 (M.D. Fla. 2008).

No court has ever found that a copyright holder alleging infringement through an IP address has failed to plausibly allege access. Instead, courts hold the opposite. “While there is a possibility that a third party has somehow gained access to Defendant’s IP address, the more likely explanation is that it is Defendant who is distributing Plaintiff’s works.” *Malibu Media LLC v. Doe*, 13-12178, 2013 WL 3945978 (E.D. Mich. July 31, 2013).

Plaintiff has sufficiently alleged that [defendant] copied its protected works by asserting that its investigator was able to download from [defendant’s] IP address one or more bits of each of the digital movie files identified by file hashes, then downloaded a full copy of each file hash from the BitTorrent file distribution network (**accessed by [defendant]**) and confirmed through independent calculation that the file hash matched the Plaintiff’s copyrighted works.

Malibu Media, LLC v. Lowry, No. 13-CV-01560-MEH, 2013 WL 6024371 (D. Colo. Nov. 14, 2013) (emphasis added).

Pelizzo states, “[t]he 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.” Brief at *37. The court considered this argument and found, regardless of the factual dispute that Pelizzo may not have had access, Malibu had a good faith belief to believe he did and its

actions were reasonable. “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.” Doc 53, Pg 8 citing Docs 17, 22, 47-6, ¶7.

Pelizzo argues, “the court erred by failing to properly examining [sic] the evidentiary record to determine whether Malibu Media’s actions against Mr. Pelizzo were frivolous and/or reasonable.” Brief at *38. This ignores that the district court did examine whether Malibu’s actions were reasonable and found that they were. “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.” Doc 53 at *10; *see also* Doc 58 Pg 4. (“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.” [Doc 53]. This objection does not in any way undermine the R & R, and thus is overruled.”)

5. The Allegation that Pelizzo was the Infringer is Plausible and Well Supported

Pelizzo's argument regarding "access", while not labeled as such, essentially amounts to a Rule 12(b)(6) argument regarding whether a claim based on an IP address can plausibly identify the subscriber as the infringer. The district court addressed these exact allegations made by Pelizzo and found that it can. "[T]aking the allegations in the light most favorable to Plaintiff, the Complaint adequately states a claim of copyright infringement." Doc 16.

Consistent with the district court, courts throughout the country have unanimously found that Malibu's complaint against an individual states a plausible claim for direct infringement. *See e.g. Malibu Media, LLC v. John Doe 1*, 2013 WL 30648 at *4 (E.D. Pa. 2013) ("Accepting all factual allegations in the Amended Complaints as true . . . the Court concludes Plaintiff has stated a claim upon which relief can be granted under the Copyright Act."); *Malibu Media, LLC v. Roldan*, 8:13-CV-3007-T-30TBM, 2014 WL 3805494 (M.D. Fla. Aug. 1, 2014) ("Plaintiff has alleged a plausible link between the subscriber assigned to IP address 96.58.134.12, Defendant, and the copyright infringement"); *Malibu Media, LLC v. Doe*, 313-CV-1579-J-32PDB, 2014 WL 2530872 (M.D. Fla. Apr. 10, 2014) ("[i]ts allegations, based on experience and practical realities, make plausible that the subscribers are the infringers"); *Malibu Media v. Roy*, Case No. 12-cv-617

(W.D. Mich. Jan. 13, 2013) (denying 12(b)(6) motion); *Malibu Media v. Pratt*, 1:12-cv-00621-RJJ, CM/ECF 31 (W.D. Mich. March 19, 2013) (same); *Malibu Media, LLC v. John Doe*, 2:13-cv-11446-AJT-DRG, CM/ECF 13 (E.D. Mich. Oct. 18, 2013) (same); *Malibu Media, LLC v. Lowry*, 2013 WL 6024371, at *5 (D. Colo. 2013) (same); *Malibu Media, LLC v. John Doe 1*, 2013 WL 30648 at *4 (E.D. Pa. 2013) (same); *Malibu Media, LLC v. Killoran*, 2:13-cv-11446-AJT-DRG, CM/ECF 13 (E.D. Mich. Oct. 18, 2013) (same); *Malibu Media, LLC v. John Doe*, 2:13-cv-00055-JVB-JEM, CM/ECF 22 (N.D. Ind. August, 16, 2013) (same); *Malibu Media LLC v. Doe*, 2013 WL 3945978 (E.D. Mich. 2013) (same); *Malibu Media LLC v. Gilvin*, 2014 WL 1260110 (N.D. Ind. Mar. 26, 2014) (same); *Malibu Media, LLC v. Sanchez*, 2014 WL 172301 (E.D. Mich. Jan. 15, 2014) (same); *Malibu Media, LLC v. Butler*, 13-cv-02707-WYD-MEH, CM/ECF 31 (D. Colo. April 24, 2014) (same).

Further, Plaintiff's complaint has survived summary judgment. *See Malibu Media, LLC v. Fitzpatrick*, 1:12-CV-22767, 2013 WL 5674711 (S.D. Fla. Oct. 17, 2013). And, Plaintiff has been awarded summary judgment in its favor. *See Malibu Media v. Bui*, 1:13-cv-163 (W.D. Mich. July 21, 2014). Plaintiff has even prevailed at trial. *See Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779, 788 (E.D. Pa. 2013) ("Malibu has satisfied its burden of proof with substantial evidence and deserves a large award."). The district court did not abuse

its discretion in finding that Malibu's claims were reasonable and brought in good faith.

CONCLUSION

For the foregoing reasons, Malibu respectfully requests this Court affirm the district court's denial of a fee award to Pelizzo pursuant to 17 U.S.C. § 505 of the Copyright Act because the district court carefully analyzed the applicable factors for a determination of same set forth by the Supreme Court and did not abuse its discretion. Further, Malibu respectfully requests the Court grant its separate Motion for Fees and Costs pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1927.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,038 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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I hereby certify that on September 15, 2014, I electronically filed the Appellee's Brief with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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