

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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RALPH VARGAS and  
BLAND-RICKY ROBERTS

Plaintiffs

vs.

PFIZER INC., PUBLICIS, INC., FLUID MUSIC,  
EAST WEST COMMUNICATIONS, INC. and  
BRIAN TRANSEAU p/k/a "BT"

Defendants

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CASE NO.: 04 CV 9772 (WHP)

ECF CASE

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS**

**\*CONFIDENTIAL\***

**TO BE FILED INDER SEAL**

Dated: New York, New York  
August 2, 2007

Respectfully submitted,

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s/Paul A. Chin

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	2
LEGAL STANDARD TO BE APPLIED.....	10
LEGAL ARGUMENT .....	11
POINT I     ATTORNEYS’ FEES ARE UNWARRANTED IN THIS ACTION	11
A.     Attorneys’ fees are not automatically awarded.....	11
B.     Plaintiffs’ claims were objectively reasonable.....	13
C.     Awarding attorneys’ fees would not further the purpose of the Copyright Act.....	17
D.     Plaintiffs’ action was not motivated or conducted in bad faith.	18
POINT II    THE ATTORNEYS’ FEE REQUEST IS UNREASONABLE	18
A.     Attorney’s fees not charged to client are unrecoverable.....	19
B.     Fees should not be awarded for work on unsuccessful legal issues.....	20
C.     No support for Defendants’ attorneys’ hourly rates.....	22
D.     Time records are excessive, duplicative and vague.....	23
POINT III   AWARDING FEES AND COSTS WOULD FINANCIALLY RUIN PLAINTFFS	25
CONCLUSION .....	25

## TABLE OF AUTHORITIES

### CASES

<u>Arbor Hill Concerned Citizens Neighborhood Ass’n v. County of Albany</u> , No. 06 Civ 0086, 2007 WL 1189487 (2d Cir. Apr. 24, 2007).....	20
<u>BMS Entertainment v. Bridges</u> , No. 04 Civ 2584, 2007 WL 1989292 (S.D.N.Y. July 6, 2007).....	22
<u>Boisson v. Banian, Ltd.</u> , 280 F.Supp.2d 10 (E.D.N.Y. 2003).....	16
<u>Branch v. Ogilvy Mather, Inc.</u> , 772 F.Supp. 1359 (S.D.N.Y. 1991).....	21
<u>Childress v. Taylor</u> , 835 F.Supp. 739 (S.D.N.Y. 1993).....	11
<u>CK Company v. Burger King Corporation</u> , No 92 Civ. 1488, 1995 WL 29488 (S.D.N.Y. Jan. 26, 1995).....	15
<u>Cohen v. W. Haven Bd. Of Police Comm’rs.</u> , 638 F.2d 496 (2d Cir. 1980).....	11
<u>Crescent Publishing Group, Inc. v. Playboy Enterprises, Inc.</u> , 246 F.3d 142 (2d Cir. 2001).....	11, 22
<u>EMI Catalogue Partnership v. CBS/Fox Company</u> , No. 86 Civ. 1149, 1996 WL 280813 (S.D.N.Y. May 24, 1996).....	16, 25
<u>Eckes v. Card Prices Update</u> , 736 F.2d 859 (2d Cir.1984).....	15
<u>Fogerty v. Fantasy, Inc.</u> , 510 U.S. 517 (1994).....	10, 17, 21
<u>Fogerty v. MGM Group Holdings Corp., Inc.</u> , 379 F.3d 348 (6th Cir. 2004).....	12-13
<u>Gaste v. Kaiserman</u> , 863 F.2d 1061 (2d Cir. 1988).....	14-15
<u>Great Importations, Inc. v. Caffco International, Inc.</u> , No. 95 Civ. 0514, 1997 WL 603410 (S.D.N.Y. Sept. 30, 1997).....	17
<u>Harris v. Wu-Tang Productions, Inc.</u> , No. 05 Civ 3157, 2006 WL 1677127 (S.D.N.Y. June 16, 2006).....	11

**TABLE OF AUTHORITIES**

**CASES**

Heng Chan v. Sung Yue Tung Corp.,  
No. 03 Civ 6048, 2007 WL 1373118 (S.D.N.Y. May 8, 2007) ..... 20

Hensley v. Eckerhart,  
461 U.S. 424 (1983)..... 11, 23

Hofheinz v. AMC Products,  
No. 00 Civ 5827, 2003 U.S. Dist. LEXIS 16940 (E.D.N.Y. Sept. 1, 2003) . 13

Hoepker v. Kruger,  
200 F.Supp.2d 340 (S.D.N.Y. 2002) ..... 11

Infinity Broadcasting Corp. v. Kirkwood,  
63 F.Supp.2d 420 (S.D.N.Y. 1999)..... 16

Kassin v. City of Schenectady,  
415 F.3d 246 (2d Cir. 2005)..... 21

Knitwaves, Inc. v. Lollytogs Ltd., Inc.,  
71 F.3d 996 (2d Cir. 1995)..... 11

Lieb v. Topstone Industries, Inc.,  
788 F.2d 151 (1986)..... 10, 19, 25

Lipton v. The Nature Company,  
71 F.3d 464 (2d Cir. 1995)..... 15

Matthew Bender & Co. v. West Publishing Co.,  
240 F.3d 116 (2d Cir. 2001)..... 10, 17

Oboler v. Goldin,  
714 F.2d 211(2d Cir. 1983) ..... 11, 21

Penguin Books U.S.A, Inc. v. New Christian Church of Full Endeavor, Ltd.,  
No. 96 Civ 4126, 2004 WL 728878 (S.D.N.Y. Apr. 6, 2004)..... 12

Repp v. Webber,  
132 F.3d 882 (2d Cir. 1997)..... 15

Scanlon v. Kessler,  
23 F.Supp.2d 413 (S.D.N.Y. 1998)..... 21, 24

Shangold v. Walt Disney, Co.,  
No. 03 Civ 9522, 2006 WL 2884925 (S.D.N.Y. Oct. 11, 2006)..... 25

**TABLE OF AUTHORITIES**

**CASES**

<u>Toliver v. County of Sullivan</u> , 957 F.2d 47 (2d Cir. 1992).....	25
<u>Vargas v. Pfizer</u> , 418 F.Supp.2d 369 (S.D.N.Y. 2005).....	2, 4, 15, 21
<u>Vargas v. Transeau</u> , No. 04 Civ 9772, 2007 WL 1346618 (S.D.N.Y. May 9, 2007).....	9, 14
<u>Williams v. New York City Housing Authority</u> , 975 F.Supp. 317 (S.D.N.Y. 1997).....	24

**STATUTES**

17 USC §505

Ralph Vargas and Bland-Ricky Roberts (collectively “Plaintiffs”), by and through their undersigned attorneys, hereby submit this Memorandum of Law in Opposition to Defendants Brian Transeau (referred to herein as “Transeau” or “Defendant BT”) and East West Communications, Inc. (referred to herein as “EWC” or “Defendant EWC”) (collectively referred to herein as “Defendants”) motion for attorneys’ fees and costs (hereinafter “Defendants’ Motion”).

### **PRELIMINARY STATEMENT**

Believing that a drum composition entitled *Aparthenonia* was identical to their drum composition *Bust Dat Groove*, Plaintiffs commenced this copyright infringement action against five defendants (Pfizer, Inc. (“Pfizer”); Publicis, Inc. (“Publicis”); Fluid Music (“Fluid”); EWC; and Transeau) responsible for the unlawful creation, distribution, commercialization and other exploitation of their composition as *Aparthenonia*. Each of the five defendants were represented by some of the largest and most prestigious law firms in the country<sup>1</sup>. Undaunted, Plaintiffs diligently pursued their claims against the defendants, successfully prevailing on defendants’ first motion for summary judgment and ultimately resolving their claims with all of the defendants except EWC and Transeau, who chose litigation over settlement.

After extensive discovery, Defendants made a second motion for summary judgment claiming that their expert evidence supported Defendant BT’s claim that he independently created *Aparthenonia* without access to, or use of, *Bust Dat Groove*. Plaintiffs claimed that their expert evidence established that Defendant BT sampled or copied *Bust Dat Groove* then digitally edited/manipulated the musical elements therein to

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<sup>1</sup> Defendant Pfizer was represented by Debevoise & Plimpton; Defendant Publicis was represented by Davis & Gilbert, LLP; Defendant Fluid Music was represented by Tiajolloff & Kelly; Defendants EWC and Transeau were represented by Davis Wright & Tremaine, LLP.

create *Aparthenonia*. Instead of allowing a jury to resolve this conflicting expert testimony, the Court allowed Defendants to prepare, and present, additional evidence (i.e. a re-creation of *Aparthenonia*) supporting their defense of independent creation. Over Plaintiffs' objections, the Court subsequently considered Defendants' additional evidence of independent creation and granted Defendants' motion for summary judgment. Defendants now seek an award of attorneys' fees and costs against Plaintiffs in an amount exceeding \$750,000,000.

In this Circuit, an award of attorney's fees to a prevailing defendant under 17 USC §505 is warranted only in cases where the plaintiff's copyright infringement claim is completely devoid of legal and factual basis (i.e. objectively unreasonable); is motivated in bad faith; or the award will further the purposes of the Copyright Act. The facts of this case conclusively show that Plaintiffs' claims in this action were objectively reasonable, were not motivated in bad faith and furthered the purpose of the Copyright Act. Therefore, this Court should deny Defendants' Motion in its entirety.

### **STATEMENT OF FACTS**

#### **A. Plaintiffs' copyright infringement action**

Plaintiff Vargas is the author and copyright owner of *Bust Dat Groove*. Vargas v. Pfizer, 418 F.Supp.2d 369, 370 (S.D.N.Y. 2005). *Bust Dat Groove* is a live drumming performance of one bar of drum music looped twenty-seven times, lasting approximately one minute. Id. The basic musical elements contained in *Bust Dat Groove* are a high-hat (cymbal), snare drum, bass drum and "ghost notes." Id. Plaintiff Roberts is the owner of the copyright in and to the sound recording album entitled "*Funky Drummer Vol. II*" ("*FD II*") that contains *Bust Dat Groove*. See, *Second Amended Complaint (Civil Docket*

for Case # 04-cv-09772-WHP (hereinafter “Dkt.”) #50) at ¶11; Vargas v. Pfizer, 418 F.Supp.2d at 371.

*Aparthenonia* is one bar of drum music which is then repeated numerous times (i.e. looped). See, *Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Second Motion for Summary Judgment (Dkt.#91)* at pg. 8. *Aparthenonia* contains the same musical elements (i.e. hi-hat, snare drum, base drum and “ghost notes”) as *Bust Dat Groove*. Id. Defendant BT was identified as the author of *Aparthenonia*, which was included on Defendant BT’s sample album entitled *Breakz from the Nu Skool*, which was manufactured, distributed, sold and licensed by Defendant EWC. Id. *Aparthenonia* was ultimately used in the musical portion of a Pfizer commercial for their drug “Celebrex.” Id.

Plaintiffs believe that defendants infringed their copyrights in and to *Bust Dat Groove* by sampling and then digitally editing/manipulating *Bust Dat Groove* to create *Aparthenonia*. Id. However, prior to commencing this action Plaintiffs obtained confirmation, from a sound engineer and music sampling expert, Ivan “Doc” Rodriguez (“Rodriguez”), that *Aparthenonia* was a sampled copy of *Bust Dat Groove* that had been digitally edited/manipulated. See, *Declaration of Ralph Vargas (“Vargas Decl.”)* at ¶4. In addition, Plaintiff Roberts wrote a letter to Publicis-USA, the company responsible for creating the Celebrex commercial, seeking to amicably resolve this matter without litigation. See, *Declaration of Paul A. Chin (“Chin Decl.”)* at Exhibit 1. On June 8, 2004, attorneys representing Publicis wrote Plaintiff Roberts denying infringement and promising to vigorously defend against any sampling claim. *Chin Decl. at Exhibit 2.* After efforts to avoid litigation were unsuccessful, Plaintiffs commenced this action against defendants.



Plaintiffs' original complaint, first amended complaint and second amended complaint all allege causes of action for direct and contributory copyright infringement against all defendants. *See, Complaint (Dkt.#1) at ¶29-48; First Amended Complaint (Dkt.#3) at ¶29-48; Second Amended Complaint (Dkt.#50) at ¶29-48.* Contrary to Defendants' contentions, Plaintiffs consistently alleged that defendants violated Plaintiff Vargas' copyrights as the author of the drum music in *Bust Dat Groove* and Plaintiff Roberts' copyright in and to the sound recording that contained *Bust Dat Groove* by distributing, using, commercializing, exploiting and/or making derivatives of *Bust Dat Groove* without Plaintiffs' written authorization or consent. *See, Complaint (Dkt.#1) at ¶¶9-10, 16-21, 29-48; First Amended Complaint (Dkt.#3) at ¶¶9-10, 17-21, 29-48; Second Amended Complaint (Dkt.#50) at ¶¶9-10, 17-21, 26, 29-48.*

**B. Plaintiffs survive defendants' first motion for summary judgment and resolve their claims against three of the five defendants**

In 2005, all five defendants jointly moved for summary judgment against Plaintiffs on the grounds that *Bust Dat Groove* was not sufficiently original to warrant copyright protection. *See, Vargas v. Pfizer, supra.* This Court denied defendants' first motion for summary judgment concluding that "...on the present record, as a matter of law, this Court cannot rule that the composition of *Bust Dat Groove* lacks originality." *Id.* at 373.

Prior to the Court's decision in Vargas v. Pfizer, the defendants jointly submitted a Rule 68 Offer of Judgment to Plaintiffs for a total amount of \$30,000.00, which Plaintiffs rejected. *Chin Decl. at Exhibit 3.* However, following the Court's decision, Plaintiffs settled their claims with Pfizer, Fluid and Publicis for \$ [REDACTED]. *See, Defendants' Motion, Declaration of Julie Ahrens in Support of Defendants' Motion*

(“*Ahrens Decl.*”) at *Exhibit P*. Defendants EWC and Transeau rejected Plaintiffs’ settlement offers and the parties continued to litigate this action. *Chin Decl. at Exhibit 4*.

### **C. Evidence produced during discovery**

#### **1. Plaintiffs’ evidence**

With very little evidence of access, Plaintiffs were required to prove that *Aparthenonia* was strikingly similar to *Bust Dat Groove*. As a result, Plaintiffs retained the services of three expert witnesses. Plaintiffs’ music/drum expert, Matthew Ritter (“Ritter”), concluded that the constituent musical elements in *Aparthenonia* were identical to the constituent musical elements in *Bust Dat Groove*. See, *Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Second Motion for Summary Judgment (Dkt.#91) at pgs. 14-15*. After conducting a transcription of the musical notes in both *Aparthenonia* and *Bust Dat Groove* Ritter found “that there [was] no single or combination of musical elements, including ‘ghost notes,’ present in *Aparthenonia* that [did] not also exist in *Bust Dat Groove*.” *Id.* at pg. 15.

Plaintiffs’ sound engineer and music sampling expert, Ivan “Doc” Rodriguez (“Rodriguez”), was able to demonstrate how Defendant BT sampled and then digitally edited/manipulated *Bust Dat Groove* in order to create *Aparthenonia*. See, *Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Second Motion for Summary Judgment (Dkt.#91) at pgs. 15-16*. Rodriguez concluded that *Aparthenonia* could not be made without sampling *Bust Dat Groove* because, when played at the same time through the same speakers, the two compositions “flanged.” *Id.* at pg. 16. Rodriguez also concluded that the two musical works were 98% the same music, the only difference being digital signal processing and reverb. *Id.*

Plaintiffs' digital signal processing and fast fourier transform spectral analysis ("FFT") expert, Dr. Steven Smith ("Dr. Smith"), produced a report in which he concluded that the FFT frequency spectra of the 2.3 seconds of the first bar of drum music from *Aparthenonia* and *Bust Dat Groove* were an exceptional match and virtually indistinguishable. *See, Plaintiffs' Memorandum of Law in Opposition to Defendants' Second Motion for Summary Judgment (Dkt.#91) at pgs. 17-18.* Dr. Smith also concluded that the overwhelming similarities in the frequency spectra of the drum sounds embodied in *Aparthenonia* and *Bust Dat Groove* provided extremely strong evidence that *Aparthenonia* was a digitally edited or manipulated copy of *Bust Dat Groove*. *Id.* at pg. 18.

## **2. Defendant BT's evidence**

Defendant BT claimed that he independently created *Aparthenonia* on the back of his tour bus using a "laptop" computer and a music-software program known as Propellerhead Reason ("Reason"). *See, Plaintiffs' Opposition to Defendants' Second Motion for Summary Judgment (Dkt.#91) at pg. 23.* In support of his defense of independent creation, Defendants' FFT expert, Dr. Richard Boulanger ("Boulanger"), concluded that FFT frequency spectra of *Aparthenonia* and *Bust Dat Groove* were not identical; therefore, Defendant BT had to have independently created *Aparthenonia*. *Id.*

## **D. Defendants' second motion for summary judgment**

### **1. Court enters a "new" dispositive motion deadline**

This Court initially ordered that all discovery in this action was to conclude on March 31, 2006 and that all dispositive motions had to be filed by May 12, 2006. *Chin Decl. at Exhibit 5, Revised Scheduling Order dated 12/8/05 ("SO#2).* In order to accommodate Defendant BT's new attorneys, David Olson, Esq. ("Olson") of the

Stanford Law School Center for Internet and Society Cyberlaw Clinic, this Court extended the discovery deadline to August 15, 2006 but did not extend the dispositive motion deadline. *Chin Decl. at Exhibit 6, Second Revised Scheduling Order dated 6/7/06* (“SO#3”). On or about August 7, 2006, almost three months after the dispositive motion deadline, Defendant BT wrote to the Court requesting an “extension” of the dispositive motion deadline so that Defendants could file a second motion for summary judgment. *Chin Decl. at Exhibit 7*. Plaintiffs opposed Defendant BT’s request on several legal and factual grounds. *Chin Decl. at Exhibit 8*. Despite Plaintiffs’ objections, the Court allowed Defendants to file their second motion for summary judgment. *Chin Decl. at Exhibit 9, Scheduling Order No.4 Dated 9/5/06* (“SO#4”).

**2. Court allows Defendants to produce and present additional evidence supporting their defense of independent creation**

Defendant BT claimed that he was entitled to summary judgment<sup>2</sup> on Plaintiffs’ copyright infringement action because: (i) there was no evidence that he had access to *Bust Dat Groove* prior to the creating *Aparthenonia*; (ii) *Aparthenonia* was not striking similar to *Bust Dat Groove*; and (iii) he independently created *Aparthenonia*. *See, Defendants’ Memorandum of Law in Support of Motion for Summary Judgment (Dkt.#86) at pgs. 1-4*. Plaintiffs argued that Defendants were not entitled to summary judgment because Plaintiffs’ experts provided overwhelming evidence that: (i) *Bust Dat Groove* and *Aparthenonia* were almost identical; and (ii) Defendant Transeau could not have created *Aparthenonia* without using *Bust Dat Groove*. *See, Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Second Motion for Summary Judgment (Dkt.#91) at pgs. 7-10, 14-18*. Plaintiffs also contended that the parties’

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<sup>2</sup> Defendant EWC joined in Defendant Transeau’s Motion.

competing expert reports on the issues of striking similarity and independent creation precluded summary judgment. *Id.* at pgs. 13-14, 26.

During oral argument, the Court recognized that the competing expert reports in this case precluded summary judgment. *Chin Decl. at Exhibit 12, Oral Argument Transcript at pg.3.* However, instead of denying Defendant's motion, the Court, without application from either party, re-opened discovery to allow Defendant BT to produce a re-creation of the original *Aparthenonia* for the Court's consideration. *Id.* at pg. 6-7. Over Plaintiffs' objection, the Court ordered Defendant to produce additional evidence in support of Defendant's motion for summary judgment by: (i) recreating *Aparthenonia* utilizing the "precise equipment" that Defendant claimed he used to create the original *Aparthenonia*; and (ii) submitting a fast fourier transform analysis ("FFT analysis") of the recreated *Aparthenonia*. *Id.* at pg. 6-8, 19-21.

On November 9, 2006, Plaintiffs filed a motion for reconsideration of the Court's order allowing Defendants to prepare and present additional evidence supporting their defense of independent creation. *See, Plaintiffs' Motion for Reconsideration and Memorandum of Law in Support (Dkt.#105-106).* This Court denied Plaintiffs' motion for reconsideration on December 15, 2006. *See, Court's Decision Dated 12/15/06 (Dkt.#119).*

### **3. The Court grants Defendants' second motion for summary judgment**

On or about December 1, 2006, Defendants submitted additional evidence supporting their defenses on summary judgment (i.e. independent creation; absence of strikingly similarity). *See, Defendants' Supplemental Declarations in Support of Motion for Summary Judgment (Dkt.#111-115).* In response, Plaintiffs argued, *inter alia*, that the Court could not consider Defendants' additional evidence because: (i) Defendant BT

failed to follow the Court's mandate requiring him to conduct a recreation of *Aparthenonia* utilizing the same materials that he allegedly used to create the original *Aparthenonia*; and (ii) the recreated *Aparthenonia* did not contain certain musical elements that were contained in the original *Aparthenonia*. See, *Supplemental Declaration of Paul A. Chin in Opposition to Defendants' Second Motion for Summary Judgment (Dkt.#124) at ¶2-5; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Strike (Dkt.#132) at pgs. 3-4*. Despite Plaintiffs' objections, the Court accepted and considered Defendants' additional evidence supporting their defense of independent creation.

On May 9, 2007, this Court granted Defendants' second motion for summary judgment. See, Vargas v. Transeau, No. 04 Civ 9772 (WHP), 2007 WL 1346618 (S.D.N.Y. May 9, 2007). The Court concluded that "Plaintiffs here have not established striking similarity, and their witnesses expressly admit to the possibility of independent creation. Under these circumstances, summary judgment is appropriate." *Id.* at \*6.

**E. Defendants' motion for attorneys' fees**

On June 29, 2007, Defendants filed a motion with this Court seeking an award of attorneys' fees and costs in excess of \$750,000.00, pursuant to 17 USC §505. See, *Defendants' Motion for Attorneys' Fees*. Defendants claim that they are entitled to such an award in this action because: (i) their successful defense of Plaintiffs' copyright infringement action furthered the purpose of the Copyright Act; (ii) Plaintiffs' claims were objectively unreasonable; and (iii) such an award would serve as a necessary deterrent for other would be plaintiffs with claims similar to Plaintiffs. See, *Memorandum of Law in Support of Defendants' Motion for Attorneys' Fees at pgs. 15-25*.

## **LEGAL STANDARD TO BE APPLIED**

### **A. Attorney's fees are not automatically awarded to a prevailing party**

The Copyright Act provides that a “court in its discretion may allow the recovery of full costs by or against any party...[and] may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” *17 U.S.C. §505*. The legal standard to apply when deciding whether to award attorneys’ fees is the same for plaintiffs and defendants. Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994). However, prevailing party status does not automatically require an award of attorney’s fees. “The word ‘may’ [in section 505 of the Copyright Act] clearly connotes discretion...The automatic awarding of attorney’s fee to the prevailing party would pretermit the [court’s] exercise of that discretion.” Id. at 533.

### **B. Objective reasonableness of Plaintiffs’ claims is the paramount issue**

In determining whether an award of attorney’s fees is warranted, the district court must consider several factors directly related to the non-prevailing party’s claims and conduct including, but not limited to: frivolousness; improper motivation; bad faith; objective unreasonableness; the need, if any, to advance considerations of compensation and deterrence; and whether imposing an award advances the purpose of the Copyright Act. Fogerty, 510 U.S. at 534 fn.19 *citing* Lieb v. Topstone Industries, Inc., 788 F.2d 151, 156 (1986). The objective reasonableness factor is accorded substantial weight in this Circuit. Matthew Bender & Co. v. West Publishing Co., 240 F.3d 116, 121-122 (2d Cir. 2001).

### **C. Determining the amount of attorney’s fees under the Copyright Act**

The calculation of attorney’s fees under the Copyright Act is determined by applying the “loadstar” approach. Crescent Publishing Group, Inc. v. Playboy Enterprises,

Inc., 246 F.3d 142, 150-151 (2d Cir. 2001). Under this approach to determining attorney's fees, fees are determined by multiplying the number of hours expended by each attorney involved in each type of work on the case by the hourly rate normally charged for similar work by attorneys of like skill in the area. See, Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). A district court should only award that amount of fees that are directly related to the prevailing party's success in the litigation and not for matters during the litigation in which the prevailing party was unsuccessful. Knitwaves, Inc. v. Lollytogs Ltd., Inc., 71 F.3d 996, 1011 (2d Cir. 1995); Oboler v. Goldin, 714 F.2d 211, 213 (2d Cir. 1983) (In determining whether or not to award attorney's fees, courts should consider the amount of work done relative to the results achieved); Childress v. Taylor, 835 F.Supp. 739, 742 (S.D.N.Y. 1993).

## **LEGAL ARGUMENT**

### **POINT I**

#### **ATTORNEYS' FEES ARE UNWARRANTED IN THIS ACTION**

##### **A. Attorneys' fees are not automatically awarded**

Defendants first claim that they are entitled to award of attorney's fees because they successfully defended against Plaintiffs' copyright infringement action by prevailing on their second motion for summary judgment. See, *Memorandum of Law in support of Defendants' Motion at pg.15-17*. However, the fact that a defendant has prevailed on a motion to dismiss or on a motion for summary judgment does not automatically require an award of fees. See, Harris v. Wu-Tang Productions, Inc., No. 05 Civ 3157 (WHP), 2006 WL 1677127, at \*5 (S.D.N.Y. June 16, 2006); Hoepker v. Kruger, 200 F.Supp.2d 340, 355 (S.D.N.Y. 2002). The paramount issue is whether or not Plaintiffs' claims were objectively reasonable and Defendants' success on their second motion for summary judgment "does not necessarily mean that the plaintiff's position was frivolous or



objectively unreasonable.” Penguin Books U.S.A, Inc. v. New Christian Church of Full Endeavor, Ltd., No. 96 Civ 4126, 2004 WL 728878, at \*2 (S.D.N.Y. Apr. 6, 2004) (other citations omitted). The facts and legal analysis of the Sixth Circuit’s decision in Fogerty v. MGM Group Holdings Corp., Inc., 379 F.3d 348 (6th Cir. 2004), clearly illustrates this principle.

The plaintiffs in Fogerty v. MGM Group Holdings Corp., Inc. brought a copyright infringement action against the defendants claiming that the defendants’ composition, “The World is Not Enough” unlawfully copied a four note sequence embodied in plaintiffs’ musical composition entitled “This Game We Play.” 379 F.3d at 351. After extensive discovery, defendants moved for summary judgment “claiming that the undisputed facts showed that [defendant] independently created “The World is Not Enough.” Id. In granting defendants’ motion for summary judgment, the district court rejected plaintiffs’ claim that the two songs were strikingly similar and concluded that “[T]here is no evidence adduced by Plaintiffs to support the proposition that the two works are so strikingly similar that copying is the only plausible explanation of the similarities.” Id. Defendants subsequently moved for attorney’s fees, pursuant to 17 USC §505, on the grounds that plaintiffs’ claims were objectively unreasonable. Id. In granting defendants’ motion, the district court held that “[P]laintiffs ['] claims were objectively unreasonable in that Plaintiffs pursued litigation despite multiple third-party declarations establishing independent creation of [“The World Is Not Enough”] before any of the Defendants had access to Plaintiffs' original work,” and “Plaintiffs offered no direct evidence to support one of the two basic elements of copyright infringement.” Id.

On appeal the Sixth Circuit reversed the district court’s award of attorney’s fees for the following reasons: (i) plaintiffs’ decision to commence their action based on the

similarities (i.e. four note sequence) between the “The World is Not Enough” and plaintiffs’ composition was not objectively unreasonable; and (ii) the evidence plaintiffs obtained through discovery (i.e. plaintiffs’ experts’ opinions that the two songs were substantially similar, etc.) gave plaintiffs objectively legitimate reasons for pursuing discovery and seeing the case through to summary judgment. *Id.* at 356-357. More importantly, in rejecting the district court’s other grounds for awarding attorney’s fees (i.e. that plaintiffs offered no direct evidence to support one of the two basic elements of copyright infringement), the Sixth Circuit stated:

“direct evidence of copying is a rarity and accordingly the failure to provide such evidence by itself never supplies an independent basis for awarding attorneys' fees..it was not until after the completion of discovery that the district court could have reached the conclusion that plaintiffs failed to provide evidence of access....[and the court] denied MGM's first motion for summary judgment and request for a stay of discovery.”

*Id.* at 357-358.

Therefore, the fact that Defendants’ ultimately prevailed on their second motion for summary judgment, by itself, does not support an award of attorneys’ fees in their favor.

**B. Plaintiffs’ claims were objectively reasonable**

In this Circuit the objectively reasonable factor is accorded substantial weight in determining whether an award of attorneys’ fees is warranted because “[T]he 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,” Matthew Bender & Co. v. West Publishing Co., 240 F.3d at 122, and “may chill litigation of close cases, preventing the clear demarcation of the boundaries of copyright law.” Hofheinz v. AMC Products, No. 00 Civ 5827, 2003 U.S. Dist. LEXIS 16940, at \*17 (E.D.N.Y. Sept. 1,

2003) *citing Fogerty*, 510 U.S. at 527. The facts in this case conclusively prove that Plaintiffs' claims were objectively reasonable.

**1. Plaintiffs presented evidence supporting their copyright claims**

In support of their motion for attorney's fees, Defendants argue that Plaintiffs' claims were objectively unreasonable because: (i) Plaintiffs presented no proof that Defendants had access to *Bust Dat Groove*; and (ii) the Court determined that Plaintiffs' experts "presented no proof sufficient to preclude the possibility of independent creation." *See, Memorandum of Law in Support of Defendants' Motion at pgs. 18-19.* Both arguments are without merit.

First, it is beyond cavil that access can be inferred in instances where the infringing work is strikingly similar to the plaintiff's work. *Gaste v. Kaiserman*, 863 F.2d 1061, 1067-1068 (2d Cir. 1988) (other citations omitted). Therefore, the fact that Plaintiffs chose to establish Defendants' access to *Bust Dat Groove* by presenting evidence that *Aparthenonia* was strikingly similar to *Bust Dat Groove* does not make Plaintiffs' copyright infringement action objectively unreasonable.

Second, Defendants misrepresent this Court's decision regarding Plaintiffs' evidence of striking similarity. While the Court determined that Plaintiffs' expert evidence was insufficient to establish striking similarity between the two musical works, the Court never concluded that Plaintiffs had failed to present evidence that *Aparthenonia* was strikingly similar to *Bust Dat Groove*. *See, Vargas v. Transeau*, No. 04 Civ 9772, 2007 WL 1346618, at \*1-2, 4 (S.D.N.Y. May 9, 2007). In order to prove striking similarity between the two works, Plaintiffs were not required to prove that the works at issue were "identical." *4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §13.02[B]* ("[S]imilarity may be regarded as striking even if somewhat less than

verbatim.”). Instead, Plaintiffs were required to present evidence such as: (i) the existence of common errors in the two works, Eckes v. Card Prices Update, 736 F.2d 859, 863 (2d Cir.1984); and (ii) the quantity of probative and verifiable matches between the two works, such as the same rhythm, musical notes, pitch and other musical fingerprints, Lipton v. The Nature Company, 71 F.3d 464, 471 (2d Cir. 1995); Repp v. Webber, 132 F.3d 882, 886-887 (2d cir. 1997); Gaste v. Kaiserman, 863 F.2d at 1068, in order to prove striking similarity.

There is no question that Plaintiffs, through their three experts, provided the Court with evidence supporting their copyright claims in this action. The fact that the Court chose not to accept the truth of Plaintiffs’ evidence on Defendants’ second motion for summary judgment does not make Plaintiffs’ claims objectively unreasonable. *See, CK Company v. Burger King Corporation*, No 92 Civ. 1488 (CSH), 1995 WL 29488, at \*1 (S.D.N.Y. Jan. 26, 1995) (refusing to award attorney’s fees to defendant even though plaintiff failed to prevail on summary judgment).

**2. Plaintiffs successfully settled some of their claims and prevailed on defendants’ first motion for summary judgment**

Defendants’ Motion also fails to recognize that Plaintiffs were able to: (i) prevail on defendants’ first motion for summary judgment; and (ii) successfully settle their claims with three of the five defendants in this action. *See, Vargas v. Pfizer*, 418 F.Supp.2d 369 (S.D.N.Y. 2005); *See, Ahrens Decl at Ex. P (Settlement Agreement)*. In an attempt to down play the significance of Plaintiffs’ settlement, Defendants conclusory state that: “[F]aced with the prospect of expensive discovery...Defendants Pfizer, Fluid Music, and Publicis settled out of the case...resulting in a payment to Plaintiffs of \$ [REDACTED].” *See, Memorandum of Law in Support of Defendants’ Motion at pg. 7*. However, conspicuously absent from Defendants’ argument is any reference to the fact

that prior to the Court's decision on defendants' first motion for summary judgment, defendants made a Rule 68 Offer of Judgment to Plaintiffs in the amount of \$30,000. *See, Chin Decl. at Exhibit 12.* Based on the strength of their claims, Plaintiffs rejected defendants' Rule 68 offer and, following the Court's decision on defendants' first motion for summary judgment, successfully settled their claims against only three of the five defendants for more than five times the amount originally offered by all five defendants.

Courts in this District have determined that facts such as these demonstrate the objective reasonableness of a non-prevailing plaintiff's copyright claims. *See, EMI Catalogue Partnership v. CBS/Fox Company, No. 86 Civ. 1149 (PKL), 1996 WL 280813, at \*2 (S.D.N.Y. May 24, 1996)* (finding unsuccessful plaintiff's claims objectively reasonable, and refusing to award attorney's fees to prevailing defendant, because plaintiff withstood defendant's summary judgment motion and partially settled, to its advantage, some of the claims against defendants); *Boisson v. Banian, Ltd., 280 F.Supp.2d 10, 20 (E.D.N.Y. 2003)* (refusing to make an award of attorney's fees where defendant had successfully survived plaintiff's motion for summary judgment); *Infinity Broadcasting Corp. v. Kirkwood, 63 F.Supp.2d 420, 427 (S.D.N.Y. 1999)* (although court granted plaintiff's motion for declaratory judgment and injunctive relief it refused to award attorney's fee to plaintiff).

Therefore, while Defendants ultimately prevailed in this action, via the Court's decision of their second motion for summary judgment, Plaintiffs' other victories in this litigation demonstrate the objective reasonableness of their claims and precludes an award for attorneys' fees.

**C. Awarding attorneys' fees would not further the purpose of the Copyright Act**

Defendants argue that their successful defense in this action “enhanced creative freedom;” therefore, an award of attorneys’ fees would further the purpose of the Copyright Act. *See, Memorandum of Law in Support of Defendants’ Motion at pg. 15.* This argument fails for several reasons.

First, the “principle purpose of the [Copyright Act] is to encourage the origination of creative works by attaching enforceable property rights to them.” Matthew Bender & Co. v. West Publishing Co., 240 F.3d at 122. An author’s right, under the Copyright Act, to secure a fair return for his creative labor serves as an important incentive in achieving the ultimate aim of the Copyright Act (i.e. to stimulate artistic creativity for the general public good). Fogerty v. Fantasy, Inc., 510 U.S. at 526-527. “To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” Id. at 527. Because the purpose of the Copyright Act may be furthered by both the prosecution of, or the defense against, a meritorious copyright claim, the fact that a defendant successfully prevails against a copyright holder with a meritorious claim does not mean that an award of attorney’s fees to the prevailing defendant “furthers the purpose of the Copyright Act.”

Second, an award of fees in favor of Defendants, given the factual and procedural history of this action, would have a “chilling effect on future plaintiffs seeking to protect their copyrights... [Plaintiffs] would have to choose between losing their rights or risking that a court might disagree with them as to infringement and award substantial fees.” Great Importations, Inc. v. Caffco International, Inc., No. 95 Civ. 0514, 1997 WL 603410, at \*1 (S.D.N.Y. Sept. 30, 1997).

Finally, Defendants contend that their victory over Plaintiffs furthers the purposes of the Copyright Act because it supports an individual's right to freely utilize common musical elements in creating new musical works. *See, Memorandum of Law in Support of Defendants' Motion at pg.15.* It is undisputed that *Aparthenonia* and *Bust Dat Groove* share the exact same musical elements. It is equally undisputed that Defendants EWC and BT charged a "licensing fee" to the general public for the right to copy or use *Aparthenonia*. *See, Plaintiffs' Memorandum of Law in Opposition to Defendants' Second Motion for Summary Judgment (Dkt.#91) at pg. 8.* Defendants' position that while the general public should have the right to freely use *Bust Dat Groove* in creating new musical works, but must pay "licensing fee" for the public's use of *Aparthenonia* in creating new musical works is absurd. Plaintiffs commenced this action to receive the same financial benefits afforded under the Copyright Act that Defendants received through their "licensing" of *Aparthenonia*; i.e. a fair return for their creative labor.

**D. Plaintiffs' action was not motivated or conducted in bad faith**

Although not discussed in Defendants' Motion, courts will not impose an award of attorney's fees in instances where the non-prevailing party's claim was not improperly motivated or litigated in bad faith. As detailed above, Plaintiffs took great care not to commence their action until: (i) they obtained independent confirmation that *Aparthenonia* was created by using *Bust Dat Groove*; and (ii) their settlement discussions proved unsuccessful. *See, pg. 3 herein.*

**POINT II  
THE ATTORNEYS' FEE REQUEST IS UNREASONABLE**

In their motion, Defendants are seeking an award of attorneys' fees and costs in excess of \$750,000.00. *See, Memorandum of Law in Support of Defendants' Motion at pgs. 23-24.* Defendants' fee request is completely unreasonable because: (A) a vast

amount of the legal work conducted in this action was done by *pro bono* attorneys employed by an organization which provides *pro bono* legal services to defendants in copyright infringement actions; (B) it seeks an award of fees for work conducted on legal issues in which Defendants were unsuccessful; and (C) the hourly rates charged by Defendants' attorneys are unreasonable.

**A. Attorney's fees not charged to client are unrecoverable**

The Copyright Act limits awards of costs and attorney's fees to the prevailing party. Because only the client, not the attorney, is a "party" to an action, it is the client in whose name and for whose benefit an application for costs and fees must be made. As a logical consequence, an award of attorney's fees can never exceed the actual amount of the attorney's fees charged to the client. *See, Lieb v. Topstone Industries, Inc.*, 788 F.2d at 156.

In this case it is undisputed that Defendant BT obtained *pro bono* counsel following this Court's decision denying defendants' first motion for summary judgment. *See, Memorandum of Law in Support of Defendants' Motion at pgs. 2, 21.* In fact, it is conceded that the "vast bulk of the work performed on this case" for Defendant BT was conducted *pro bono*. *Id.* at pg. 2. David Olson, Esq. ("Olson") and Anthony Falzone, Esq. ("Falzone"), represented Defendant BT *pro bono* in this action pursuant to their employment with the Fair Use Project at Stanford Law School Center for Internet and Society and the Cyberlaw Clinic ("SLC"). *See, Declaration of Anthony T. Falzone ("Falzone Decl.") at ¶1-2; Declaration of David S. Olson ("Olson Decl.") at ¶1-2.* Given the fact that the "fair use" doctrine is a defense to a copyright infringement action, it seems logical to assume that SLC primarily provides *pro bono* representation for copyright infringement defendants. As employees of SLC, it is also reasonable to assume



that, both Olson and Falzone are compensated for all legal work they perform on behalf of SLC's *pro bono* clients, including the legal work conducted on behalf of Defendant BT.

In opposing an award of attorneys' fees to Defendant BT's *pro bono* counsel, Plaintiffs is not suggesting that attorneys who provide *pro bono* legal services for clients should be penalized. Instead, Plaintiffs is merely suggesting that an award of attorneys' fees to Olson and Falzone for their *pro bono* representation of Defendant BT would constitute a windfall for these attorneys because both Olson and Falzone: (i) are employed by SLC's Fair Use Project which, presumably, provides *pro bono* legal services to defendants in copyright infringement actions; and (ii) have already been fairly compensated, through their paid employment with SLC, for their representation of Defendant BT in this action.

Finally, the two cases cited by Defendants allegedly supporting their position did involve an award of attorney's fees to *pro bono* counsel under section 505 of the Copyright Act. *See, Memorandum of Law in Support of Defendants' Motion at pg. 22; Heng Chan v. Sung Yue Tung Corp.*, No. 03 Civ 6048, 2007 WL 1373118, at \*1 (S.D.N.Y. May 8, 2007) (concerned federal and state labor law statutes providing attorney's fees to prevailing parties); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, No. 06 Civ 0086, 2007 WL 1189487, at \*1 (2d Cir. Apr. 24, 2007) (concerned an award of attorney's fees to prevailing party under the Voting Rights Act of 1965).

**B. Fees should not be awarded for work on unsuccessful legal issues**

When considering what amount of attorney's fees should be awarded to a prevailing party under section 505 of the Copyright Act, courts must treat prevailing

defendants and prevailing plaintiffs alike. Fogerty, 510 U.S. at 534. A prevailing plaintiff in a copyright infringement action will be awarded “only that amount of attorney’s fee that is reasonable in relation to the results obtained.” Kassin v. City of Schenectady, 415 F.3d 246, 253-254 (2d Cir. 2005). Generally, a district court will not make an award of attorney’s fees for work done on matters in which the prevailing plaintiff was unsuccessful. *See*, Scanlon v. Kessler, 23 F.Supp.2d 413, 418 (S.D.N.Y. 1998)(reducing plaintiff’s award of attorney’s fees by two-thirds reflecting plaintiff’s limited success on various infringement claims); Branch v. Ogilvy Mather, Inc., 772 F.Supp. 1359, 1365-1367 (S.D.N.Y. 1991) (court refused to award attorney’s fees on work done in the litigation in which plaintiff was not successful). Therefore, a district court should not make an award of attorney’s fees for work done on legal issues litigated in the action in which the defendant was not successful. Oboler v. Goldin, 714 F.2d at 213 (In determining whether or not to award attorney’s fees, courts should consider the amount of work done relative to the results achieved).

A large portion of the attorneys’ fees requested by Defendants concerns work done on legal issues in which Defendants were unsuccessful. For example, Defendant Transeau was represented by the law firm of Davis Wright & Tremaine, LLP (“DWT”) from March 2005 to March 21, 2006. *See, Defendants’ Motion, Declaration of Eric M. Stahl* (“*Stahl Decl.*”) at ¶2. During this period, all of the named defendants, including Defendants Transeau and EWC, unsuccessfully moved for summary judgment (the “Defendants’ first summary judgment motion”) against Plaintiffs. *See, Vargas v. Pfizer*, 418 F.Supp.2d 369 (S.D.N.Y. 2005). Despite this fact, DWT is seeking an award of its attorneys’ fees for work DWT conducted on Defendants’ unsuccessful summary judgment motion. *See, Stahl Decl., et. seq.*

Given the Supreme Court's mandate that district courts treat prevailing defendants and prevailing plaintiffs the same when determining the amount of attorney's fees to be awarded, this Court should not award any attorney's fees to Defendants' attorneys for work conducted on legal issues in which Defendants were unsuccessful.

**C. No support for Defendants' attorneys' hourly rates**

Although generally adopting the lodestar method in determining attorney's fees under section 505 of the Copyright Act, the Second Circuit also recognizes that the actual billing arrangement between counsel and client provides a strong indication of what constitutes a reasonable hourly fee. Crescent Pub. V. Playboy Enterprises, Inc., 246 F.3d at 150-151. "In determining the 'presumptively reasonable fee,' the Court should first consider the reasonable hourly rate that a paying client would be willing to pay, taking all case specific variables into account." BMS Entertainment v. Bridges, No. 04 Civ 2584, 2007 WL 1989292, at \*2 (S.D.N.Y. July 6, 2007). "In determining what rate a paying client would be willing to pay, the district court should...bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." Id.

In this case, Defendant BT consented to the withdrawal of his original attorneys in this action, DWT, who had been charging him an hourly rate of "\$290 in 2005, \$320 in 2006, and \$340 in 2007." *See, Stahl Decl. at ¶4.* He then opted to obtain *pro bono* representation from attorneys (i.e. Olson and Falzone) employed by SLC's Fair Use Project. In their declarations, Olson and Falzone claim that their respective hourly rates of \$300 and \$350 is fair and reasonable. These hourly rates are not reasonable for two reasons.

First, if the reasonable hourly rate is the rate a paying client would be willing to pay, then the hourly rates suggested by Olson and Falzone are unreasonable because

Defendant BT, in firing DWT, was not willing to pay anything for legal representation. At the very least, Defendant BT was unwilling to pay more than \$320 per hour as evinced by his consent to allow DWT withdraw their representation of him in this action. In addition, neither Olson nor Falzone have produced a copy of their retainer agreement with Defendant BT detailing their expected compensation for legal services to be rendered.

Second, neither Olson nor Falzone have provided this Court with any relevant information from which this Court could conclude that their hourly rates are fair and reasonable. *See, Hensley v. Eckerhart*, 461 U.S. at 433 (party seeking an award of attorney's fees must produce evidence supporting the attorney's hourly rate). The information regarding the hourly rate that Olson and Falzone charged paying clients when they were in private practice seems irrelevant given that they represented Defendant BT on a *pro bono* basis and that their representation of Defendant BT arose out of their "paid" employment with SLC's Fair Use Project. What would be useful in this circumstance would be information regarding Olson and Falzone's annual salaries as employees of SLC because: (i) the Court would be able to calculate from their annual salaries the hourly rate equivalent; and/or (ii) their annual salaries, or the hourly rate equivalent, fairly represents the compensation Olson and Falzone normally receive when they provide legal services to *pro bono* clients for SLC.

**D. Time records are excessive, duplicative and vague**

While Defendants were represented by large law firms or fully staffed law school clinics, Plaintiffs were represented by a solo-practitioner<sup>3</sup>. In addition, Plaintiffs' action presented two very straight forward copyright claims (i.e. direct and contributory

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<sup>3</sup> Paul A. Chin is a solo practitioner.

infringement) ultimately hinging on whether or not *Aparthenonia* was strikingly similar to *Bust Dat Groove*. Given these facts, it seems unreasonable that Defendants' defense to Plaintiffs' claims required the legal services of two full time attorneys and a paralegal from SLC's Fair Use Project<sup>4</sup>; two partners, two associates and two paralegals from the law firm of Kirkland & Ellis<sup>5</sup>; and one partner, three associates and two legal assistants from the law firm of Davis Wright Tremaine, LLP<sup>6</sup>. Defendants should not be able to recover for attorneys' fees that are excessive. *See, Hensley v. Eckerhart*, 461 U.S. at 434 (court may refuse to grant a fee request for time entries that are excessive); *Williams v. New York City Housing Authority*, 973 F.Supp. 317, 325 (S.D.N.Y. 1997).

Notwithstanding the foregoing, the time records presented by Defendants' attorneys are replete with vague descriptions of work performed; charges for time spent on legal issues unrelated to Defendants' second motion for summary judgment; charges for time spent on conference calls and other meetings or discussions without detailing the purpose of these meetings or their relevance to the Defendants' defense in this action.

According to their time records, Defendants' attorneys, collectively, spent a total of 1,977 hours representing Defendants in this action. *See, Falzone Decl. at ¶8-13*. However, Defendants' time records fail to itemize, with sufficient detail, the time entries solely relating to work done in connection with Defendants' second motion for summary judgment. *Scanlon v. Kessler*, 23 F.Supp.2d 413, 417 (S.D.N.Y. 1998)(court refused to award fees for time entries that did not itemize work done in connection with plaintiff's

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<sup>4</sup> *See, Falzone Decl., et. seq.*;

<sup>5</sup> *See, Defendants' Motion, Declaration of Christian Chadd Taylor, et. seq.*

<sup>6</sup> *See, Stahl Decl., et. seq.*

successful claims). As a result, this Court should significantly reduce the attorneys' fees requested by Defendants' attorneys or deny Defendants' request in its entirety<sup>7</sup>.

**POINT III  
AWARDING FEES & COSTS WOULD FINANCIALLY RUIN PLAINTIFFS**

District courts may take into consideration the financial circumstances of the non-prevailing party in determining the amount of attorney's fees and costs under section 505 of the Copyright Act. Toliver v. County of Sullivan, 957 F.2d 47, 49-50 (2d Cir. 1992).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Based on these facts, imposition of an award of attorneys' fees and costs in excess of \$750,000.00, as requested by Defendants, "would wreak financial ruin on Plaintiffs..." Shangold v. Walt Disney, Co., No. 03 Civ 9522 (WHP), 2006 WL 2884925, at \*1 (S.D.N.Y. Oct. 11, 2006). The Court should deny Defendants' motion because the "aims of the [Copyright] statute are compensation and deterrence where appropriate, but not ruination." Lieb v. Topstone Industries, Inc., 788 F.2d at 156.

**CONCLUSION**

For the reasons stated herein, Defendants' Motion should be denied in its entirety.

Dated: New York, New York  
August 2, 2007

Respectfully submitted,

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s/Paul A. Chin  
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<sup>7</sup> A denial of an award of attorney's should also require a denial for costs. EMI Catalogue Partnership v. CBS/Fox Company, No. 86 Civ. 1149 (PKL), 1996 WL 280813, at \*1-2 (S.D.N.Y. May 24, 1996).

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**CERTIFICATE OF SERVICE**

On the 2<sup>nd</sup> day of August, 2007, a true and correct copy of PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEYS' FEES, and the exhibits and declarations attached thereto and in support thereof, was served via e-mail and first-class mail, postage pre-paid, to the following attorneys representing the Defendants:

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