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**United States District Court
Central District of California**

PETER GALLAGHER,
Plaintiff,

v.

LIONS GATE ENTERTAINMENT INC.,
LIONS GATE FILMS INC., MUTANT
ENEMY, INC., JOSEPH “JOSS”
WHEDON, ANDREW GODDARD, and
DOES 1–50, inclusive,
Defendants.

Case No. 2:15-cv-02739-ODW-E

**ORDER GRANTING ATTORNEY’S
FEES AND COSTS PURSUANT TO
17 U.S.C. § 505 [29]**

I. INTRODUCTION

Plaintiff Peter Gallagher (“Plaintiff” or “Gallagher”)¹ brought suit against Defendants Lions Gate Entertainment Inc., Lions Gate Films Inc., Mutant Enemy, Inc., Joseph “Joss” Whedon, Andrew Goddard, and Does 1 through 50 (collectively “Defendants”) for copyright infringement of his book *The Little White Trip: A Night in the Pines* (“Trip”) by Defendants and their film, *The Cabin in the Woods* (“Cabin”).

¹ After filing this lawsuit, Plaintiff married and legally changed his name from “Gallagher” to “Green.” (Gallagher Decl. 1.) For purposes of this order, the Court will continue to refer to Plaintiff by his prior surname, as listed on the case caption.

1 (ECF No. 15, First Amended Complaint (“FAC”).) On September 11, 2015, this
2 Court granted Defendants’ Motion to Dismiss all of Plaintiff’s claims. (ECF No. 27.)
3 As the prevailing party, Defendants now move for attorney’s fees under Section 505
4 of the Copyright Act. 17 U.S.C. § 505. For the reasons set forth below, Defendants’
5 Motion for Attorney’s Fees and Costs is **GRANTED**.

6 **I. BACKGROUND**

7 **A. Factual History**

8 Gallagher is the author and owner of all exclusive rights under copyright of the
9 literary work *Trip*. (ECF No. 15, FAC ¶ 12.) Gallagher developed the idea for *Trip*
10 and drafted an outline of that idea in 2004; he then completed the initial draft between
11 late 2004 and early 2005. (*Id.* ¶¶ 13–14.) *Trip* was published in or about June 2006,
12 with 2,500 copies of the book printed for sale. (*Id.* ¶ 17.) Gallagher then began
13 selling copies of *Trip* on the Venice Beach Boardwalk, the Santa Monica Third Street
14 Promenade, and outside the Chinese Theatre on the Hollywood Walk of Fame. (*Id.* ¶
15 18.) Over the course of one and a half years, Gallagher sold approximately 5,000
16 copies of the book, primarily in the Santa Monica and Venice Beach areas. (*Id.* ¶ 25.)

17 Defendants are the writers, producers, and distributors of the movie *Cabin*,
18 which was released in 2012. (*Id.* ¶¶ 4–8.) All Defendants other than Andrew
19 Goddard and Mutant Enemy, Inc. reside or operate out of Santa Monica, with the
20 other two Defendants listed as residing or operating out of Los Angeles County. (*Id.*)
21 Gallagher alleged that *Cabin* copied extensively from *Trip* in addition to having
22 access and thereon bases his allegations of copyright infringement. (*Id.* ¶ 29.)

23 **B. Procedural History**

24 Gallagher first contacted Defendants on January 7, 2014, after being “stricken”
25 by what he perceived to be similarities between *Cabin* and his own creative work.
26 (Green² Decl., ¶ 6; Kim Decl., Ex 1 10.) Plaintiff claims Defendant Lions Gate sent a
27 reply letter dated January 21, 2014, informing Gallagher that Lions Gate would

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² Peter Green and Peter Gallagher are one and the same. *See supra* note 1.

1 investigate his claims.³ (Green Decl. ¶ 7.) On February 11, 2014, Plaintiff responded
2 by outlining how he conceived of the idea for *Trip*, explaining the book's availability,
3 and implicitly demanded seven million dollars in damages. (Kim Decl., Ex. 1 14–15;
4 Ex. 2.) Defendants responded through outside counsel on March 31, 2014, charting
5 the reasons why Gallagher could not meet the accessibility and substantial similarity
6 requirements under the Copyright Act. (Kim Decl. Ex. 3 18–19.) In closing,
7 Defendants made clear that, should Gallagher proceed with his claims and file suit,
8 Defendants would seek attorney's fees and costs as provided by the Copyright Act.
9 (*Id.* at 19.) Gallagher made no attempt to communicate with Defendants for over a
10 year; Gallagher then filed his Complaint in this Court on April 13, 2015. (ECF No.
11 1.) Gallagher failed to serve the Complaint. (Mot. 2.)

12 On May 1, 2015, Defendants provided Plaintiff's Counsel with a detailed,
13 eleven-page document outlining the controlling case law governing Copyright Act
14 claims in this District and explained that Plaintiff's claims could not meet the
15 accessibility and substantial similarity requirements of the Act. (Kim Decl. Ex. 4 20–
16 30.) Again, Defendants urged Plaintiff to withdraw his Complaint, or Defendant
17 would seek attorney's fees and costs. (*Id.* at 28–29.) Counsel for both parties spent
18 the next several weeks trading phone calls and emails in accordance with the Court's
19 meet-and-confer requirements under Local Rule 7.3. (Kim Decl., Ex. 5.) With
20 Plaintiff still refusing to withdraw his Complaint, Defendants moved to dismiss all of
21 Plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6). (ECF No. 11.) The
22 next day, Plaintiff filed a First Amended Complaint. (ECF No. 15.) Defendants then
23 moved to dismiss the FAC in its entirety. (ECF No. 18.)

24 After assessing the briefing from both parties on the 12(b)(6) motion, the Court
25 granted Defendant's motion, finding no substantial similarity. (ECF No. 27, Order.)
26 Defendants now move for attorney's fees and costs, pursuant to Section 505 of the
27 Copyright Act. 17 U.S.C. § 505.

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³ Neither party has included a copy of this letter, though Plaintiff references it in his opposition papers and declaration.

1 II. LEGAL STANDARD

2 A. Standard for Recovery of Attorney Fees in Copyright Cases

3 The Copyright Act grants the court discretion to determine a prevailing party's
4 recovery of costs and attorney fees in a copyright case. 17 U.S.C. § 505. When
5 making such a determination, the court may consider several nonexclusive factors
6 including "frivolousness, motivation, objective unreasonableness (both in the factual
7 and in the legal components of the case) and the need in particular circumstances to
8 advance considerations of compensation and deterrence." *Fogerty v. Fantasy Inc.*,
9 510 U.S. 517, 535 n.19 (1994) (quoting *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151,
10 156 (3d Cir. 1986) (the "Lieb factors")). The court must also consider the degree of
11 success obtained by the prevailing party. *Jackson v. Axton*, 25 F.3d 884, 890 (9th Cir.
12 1994) *overruled on other grounds by Fogerty*, 510 U.S. at 531–2 (citing *Hensley v.*
13 *Eckerhart*, 461 U.S. 424, 436 (1983)).

14 While the discretion to award fees and costs does not require an explicit finding
15 of bad faith or blameworthiness on behalf of the losing party, any improper motives or
16 "culpability in bringing or pursuing the action" may also influence this determination.
17 *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 555–58 (9th Cir. 1996). Finally, when applying
18 the above factors, a court must do so while remaining "faithful to the purposes of the
19 Copyright Act," which include not only "[securing] a fair return for an 'author's
20 creative labor,'" but also the "[stimulation of] artistic creativity for the general public
21 good." *Fogerty*, 510 U.S. at 526–27 (quoting *Twentieth Century Music Corp. v.*
22 *Aiken*, 422 U.S. 151, 156 (1975)). If an award of fees would not comport with these
23 policies, then fees should not be awarded. *Fantasy, Inc.*, 94 F.3d at 558.

24 B. Reasonable Fees: Calculating the Lodestar

25 A reasonable fee award is initially determined by calculating the "lodestar"
26 figure: the number of hours reasonably expended multiplied by a reasonable hourly
27 rate. *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992); *Hensley*, 461 U.S. at
28 433; *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). At the outset, "[t]he

1 fee applicant bears the burden of documenting the appropriate hours expended in
2 litigation and must submit evidence in support of those hours worked.” *Gates*, 987
3 F.2d at 1397. “Those hours may be reduced by the court where documentation of the
4 hours is inadequate; if the case was overstaffed and hours are duplicated; if the hours
5 expended are deemed excessive or otherwise unnecessary.” *Chalmers v. City of Los*
6 *Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g denied, amended on other*
7 *grounds*, 808 F.2d 1373 (1987).

8 The determination of the number of hours reasonably expended is also informed
9 by the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714
10 (5th Cir. 1974) and adopted in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir.
11 1975); *see Chalmers*, 796 F.2d at 1211. The *Johnson-Kerr* factors include (1) the
12 time and labor required; (2) the novelty and difficulty of the questions involved; (3)
13 the skill requisite to perform the legal service properly; (4) the preclusion of other
14 employment by the attorney due to acceptance of the case; (5) the customary fee; (6)
15 whether the fee is fixed or contingent; (7) time limitations imposed by the client or the
16 circumstances; (8) the amount involved and the results obtained; (9) the experience;
17 reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the
18 nature and length of the professional relationship with the client; and (12) awards in
19 similar cases, though those that are irrelevant to the particular case need not be
20 considered. *Kerr*, 526 F.2d at 69–70; *Hensley*, 461 U.S. at 363–64; *but see Davis v.*
21 *City and Cnty. of San Francisco*, 976 F.2d 1536, 1546 (9th Cir. 1992), *vacated in part*
22 *as moot by Davis v. City and Cnty. of San Francisco*, 984 F.2d 345 (9th Cir. 1993)
23 (recognizing the irrelevance of the sixth *Johnson-Kerr* factor, and the “doubt[ful]
24 relevance” of factor ten).

25 The lodestar calculation is strongly presumed to yield a reasonable fee. *City of*
26 *Burlington*, 505 U.S. at 562; *Gates*, 987 F.2d at 1397. However, a court may depart
27 from the lodestar amount if doing so is “necessary to the determination of a reasonable
28 fee.” *City of Burlington*, 505 U.S. at 562 (quotations and citation omitted). If the

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