UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REBECCA FAY WALSH, Plaintiff, -v- TOWNSQUARE MEDIA, INC., Defendant.	:	19-CV-4958 (VSB) **OPINION & ORDER**

Appearances:

Richard Liebowitz
Liebowitz Law Firm, PLLC
Valley Stream, New York
Counsel for Plaintiff

Rachel Fan Stern Strom
James E. Doherty
Davis Wright Tremaine LLP
New York, New York
Counsel for Defendant

VERNON S. BRODERICK, United States District Judge:

On June 1, 2020, I issued an Opinion and Order in which I granted Defendant's Rule 12(c) motion and dismissed this action, because I found that Plaintiff's copyright infringement claim was barred by the fair use doctrine. *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (the "Opinion"). I also denied Plaintiff's motion for reconsideration of the Opinion, and I reserved judgment on Defendant's motion for attorneys' fees under the Copyright Act, 17 U.S.C. § 505, until the parties filed "materials showing the course of negotiations" to settle this action. *Walsh v. Townsquare Media, Inc.*, 19-CV-4958 (VSB), 2021 WL 4481602, at *3 (S.D.N.Y. Sept. 30, 2021) ("Reconsideration Opinion"). Subsequently, "both parties . . .

consent[ed] to the public filing" of "settlement communications," (Doc. 45), which are now available on the docket, (Settlement Emails).[1]

I have reviewed the record in this case, the parties' briefing on the issue of attorneys' fees, including the settlement communications, and the applicable law. For the reasons that follow, Defendant's motion for attorneys' fees under the Copyright Act is GRANTED.[2]

I. Discussion

Section 505 of the Copyright Act allows district courts to "award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. In this regard, § 505 "grants courts wide latitude to award attorney's fees based on the totality of circumstances." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985 (2016). Indeed, because of the Copyright Act's statutory grant of authority, "in any given [copyright] case a court may award fees even though the losing party offered reasonable arguments (or, conversely, deny fees even though the losing party made unreasonable ones)." *Hughes v. Benjamin*, No. 17-cv-6493 (RJS), 2020 WL 4500181, at *3 (S.D.N.Y. Aug. 5, 2020) (Sullivan, J.) (quoting *Kirtsaeng*, 136 S. Ct. at 1988).

My inquiry in determining whether to award fees must account for "the totality of the circumstances" and should consider "factors" that include "frivolousness, motivation, objective unreasonableness, and the need in particular circumstances to advance considerations of compensation and deterrence." *See Kirtsaeng*, 136 S. Ct. at 1985–86 (citation omitted); *Hello I Am Elliot, Inc. v. Sine*, 19 Civ. 6905 (PAE), 2021 WL 1191971, at *4 (S.D.N.Y. Mar. 30, 2021) ("Several nonexclusive factors inform a court's fee-shifting decisions: frivolousness, motivation,

[1] "Settlement Emails" refers to Exhibit A to the joint letter of the parties filed with the Court on October 20, 2021. (Doc. 45-1.)

[2] Here, I presume familiarity with the Opinion and the Reconsideration Opinion, which thoroughly recount the factual background and procedural history of this action.

objective unreasonableness, and the need in particular circumstances to advance considerations of compensation and deterrence." (internal quotation marks and alterations omitted)). "[S]uch factors may be used only 'so long as they are faithful to the purposes of the Copyright Act.'" *Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116, 121 (2d Cir. 2001) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994)). I consider these factors and determine that they favor the award of attorneys' fees in this case.

A. *Objective Unreasonableness & Frivolousness*

The factors of objective unreasonableness and frivolousness are often analyzed together, as "[t]he test for frivolousness largely duplicates that of objective unreasonableness." *Boesen v. United Sports Publ'ns, Ltd.*, 20-CV-1552 (ARR) (SIL), 2021 WL 1145730, at *3 (E.D.N.Y. Mar. 25, 2021); *TCA Television Corp. v. McCollum*, No. 15-CV-4325 (GBD) (JCF), 2017 WL 2418751, at *14 (S.D.N.Y. June 5, 2017) ("Cases indicate . . . that frivolousness is a particularly intense form of objective unreasonableness."), *report & recommendation adopted*, 2018 WL 2932724 (S.D.N.Y. June 12, 2018). "[F]rivolousness and objective unreasonableness are not necessarily coextensive." *Gordon v. McGinley*, No. 11 Civ. 1001(RJS), 2013 WL 1455122, at *2 n.3 (S.D.N.Y. Mar. 28, 2013) (Sullivan, J.) (citing *Matthew Bender & Co.*, 240 F.3d at 122 ("An objectively unreasonable argument is not necessarily frivolous or made in bad faith.")). However, here, since "the parties do not brief the issue of frivolousness separately from objective reasonableness," there is no need to for me to analyze the factors separately. *See Agence France Presse v. Morel*, 10-cv-2730 (AJN), 2015 WL 13021413, at *5 (S.D.N.Y. Mar. 23, 2015), *aff'd sub nom. Presse v. Morel*, 645 F. App'x 86 (2d Cir. 2016).

I held in the Opinion that the fair use factor of purpose and character of the use—which lies at "'the heart of the fair use inquiry in this Circuit,'" 464 F. Supp. 3d at 580 (alteration marks

omitted) (quoting *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001))—"favors Defendant because the Article uses the Photograph for an entirely different purpose than originally intended," *id.* at 581. Specifically, I found that "Defendant published the Post, which incidentally contained the Photograph, because the Post—or, put differently, the fact that Cardi B had disseminated the Post—was the very thing the Article was reporting on." *Id.* at 582 (footnote omitted). After finding that this arguably most-important factor favored finding fair use, I went on to rule that each of the other fair use factors favored defendant. *Id.* at 585–86.

Unlike some fair use cases, this one was not a close call. Although "a news reporting purpose by no means guarantees a finding of fair use," *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 85 (2d Cir. 2014), it is well established in this Circuit that "use of a copyrighted photograph" is generally fair "where 'the copyrighted work is itself the subject of the story, transforming the function of the work in the new context.'" Opinion, 464 F. Supp. 3d at 581 (collecting cases and quoting *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 352 (S.D.N.Y. 2017)). The same is true where the subject of the story is a work that incidentally contains a plaintiff's work. *See Clark v. Transp. Alternatives, Inc.*, 18 Civ. 9985 (VM), 2019 WL 1448448, at *3 (S.D.N.Y. Mar. 18, 2019). As such, this case was far afield from ones that reject a fair use argument because "'an image [was used] solely to present the content of that image, in a commercial capacity,' or [was] otherwise use[d] . . . 'for the precise reason it was created.'" Opinion, 464 F. Supp. 3d at 581 (quoting *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 407 (S.D.N.Y. 2016)).[3]

Critically, Plaintiff's counsel repeatedly opposed a finding of fair use by taking

[3] Plaintiff argues that cases involving "the fair use doctrine often present close calls that are difficult to predict," (Doc. 33, at 16 (citation omitted)), but this generic argument fails to grapple with specifics relevant to this case.

"objectively [un]reasonable litigation position[s]" that require one to disregard the actual "facts of this case." *Cf. Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 108 (2d Cir. 2014); *Amanze v. Adeyemi*, 18 CIV. 8808 (NRB), 2019 WL 2866071, at *10 (S.D.N.Y. July 3, 2019) (granting fees under § 505 where "[n]early every argument advanced by plaintiff in this case was either frivolous or based upon mischaracterizations"), *aff'd*, 824 F. App'x 86 (2d Cir. 2020). Even though it was "apparent on the face of the Article" that "Defendant did not publish the Photograph simply to present its content," Opinion, 464 F. Supp. 3d at 581, Plaintiff's counsel obstinately pretended otherwise. In the briefing leading up to the Opinion, Plaintiff's counsel argued "that Defendant used the Photograph merely to illustrate 'a news report about Cardi B at Tom Ford's fashion show,'" which I found to be "manifestly untrue." *Id.* at 581 n.12 (citation omitted). Even in her briefs opposing Defendant's motion for fees, Plaintiff continues to argue that "[a]ny photograph of Cardi B would have sufficed [for Defendant's Article], which means the Defendant's use of the Photograph was entirely interchangeable." (Doc. 33, at 15.) For the reasons explained in my prior opinions and *supra*, it is impossible to square Plaintiff's arguments with the facts of this case. As such, I do not see how a "reasonable lawyer with any familiarity of the law of copyright could have thought that the" incidental use of the Photograph "in the context of news reporting" on the Post "was anything but fair." *See Konangataa v. Am. Broadcastingcompanies, Inc.*, 16-cv-7382 (LAK), 2017 WL 2684067, at *2 (S.D.N.Y. June 21, 2017).[4]

[4] Plaintiff's counsel's position that there was "good faith intent" behind his arguments, (Doc. 33, at 16), is thus belied by the record. Moreover, unlike with awards of attorneys' fees under Federal Rule of Civil Procedure 11, the § 505 analysis does not require a finding of a lack of good faith for a district court to award attorneys' fees, as Rule 11 and § 505 have different analytical frameworks. *See, e.g.*, *Sorenson v. Wolfson*, 683 F. App'x 33, 36–37 (2d Cir. 2017) (analyzing a motion for attorneys' fees under § 505 separately from a motion for sanctions for bad faith conduct); *Burger-Moss v. Steinman*, 127 F.R.D. 452, 453 (S.D.N.Y. 1989) (explaining differences between the award of attorneys' fees "under 28 U.S.C. § 1927 and § 505 of the Copyright Act" and "Rule 11"); *Margo v. Weiss*, No. 96 CIV. 3842(MBM), 1998 WL 765185, at *1 (S.D.N.Y. Nov. 3, 1998) (explaining that "objective

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