IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ERIC and TRACY EHMANN,

Plaintiffs,

v.

NICHOLAS and TRISH METROPULOS,
dba Home of The Hodag Wear,
dba Metro Screenprinting and Embroidery,

Defendant.

OPINION & ORDER

19-cv-586-wmc

Plaintiffs Eric and Tracy Ehmann claimed copyright ownership in a number of original artistic designs of the "Hodag," the mascot of Rhinelander, used by defendants Nicholas and Trish Metropulos to print and sell merchandise online and in their store. Specifically, plaintiffs alleged that in 2006, Tracy Ehmann created and registered a copyright in the Hodag logos before later transferring all of her ownership and copyright interests in those logos to her husband, Eric Ehmann. Plaintiffs further alleged that they discovered in 2019 that defendants were using the same Hodag logos without license or permission to do so. Defendants disputed Eric Ehmann's ownership interest and alleged that in or around 2007, Tracy Ehmann had verbally granted them permission to use her logos in return for satisfaction of her unpaid debt with their store.

Following a two-day trial, the jury returned a unanimous verdict in favor of defendants, finding that they proved by preponderance of the evidence that Tracy Ehmann granted them an implied license to use the Hodag logos on merchandise sold at retail. (Jury Verd. (dkt. #168).) The court entered judgment in favor of defendants the following day, March 17, 2021. (Judg., (dkt. #169).). Defendants now ask the court to award them $46,988.95 in

attorneys' fees and $7,165.30 in costs as the prevailing party in a copyright infringement lawsuit under 17 U.S.C.A. 505. (Dkt. #171 and #174.)

For the reasons that follow, the court will grant defendants' motion for attorney's fees in the amount of $24,175.25, as well as grant in part and deny in part defendants' bill of costs in the amount of $2,166.30 in costs, for a total award of $26,341.55.

OPINION

I. Attorney Fees

A. Award of Fees

Under the Copyright Act, a district court "may allow the recovery of full costs. . . and may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. The Act's language "clearly connotes discretion, and eschews any 'precise rule or formula' for awarding fees." *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 202 (2016) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533, 534 (1994)). However, a district court's discretion is limited by two principles. *Moffat v. Acad. of Geriatric Physical Therapy*, No. 15-CV-626-JDP, 2017 WL 4217174, at *1 (W.D. Wis. Sept. 20, 2017). First, "a district court may not 'award[ ] attorney's fees as a matter of course'; rather, a court must make a more particularized, case-by-case assessment." *Kirtsaeng,* 579 U.S. at 202 (quoting *Fogerty*, 510 U.S. at 533). Second, the court "may not treat prevailing plaintiffs and prevailing defendants any differently." *Id*. Defendants should be "encouraged to litigate [meritorious defenses] to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id*. (quoting *Fogerty*, 510 U.S. at 527). Thus, the Copyright Act "treats both sides equally and allows an award in either direction." *Riviera Distributors, Inc. v. Jones*, 517 F.3d 926, 928 (7th Cir. 2008).

Within these two limiting principles, a district court may consider several discretionary factors: (1) frivolousness of claims or defenses; (2) motivation of the parties; (3) objective unreasonableness (both in the factual and in the legal components of the case); and (4) the need in particular circumstances to advance considerations of compensation and deterrence. *Kirtsaeng*, 579 U.S. at 202 (quoting *Fogerty*, 510 U.S. at 534, n.19); *Timothy B. O'Brien LLC v. Knott*, 962 F. 3d 348, 350 (7th Cir. 2020). This is not an exclusive list of factors because the district court has wide discretion to consider the totality of circumstances. *Id*.

In the Seventh Circuit, "the two most important considerations . . . 'are the strength of the prevailing party's case and the amount of damages or other relief the party obtained.'" *Klinger v. Conan Doyle Estate, Ltd*., 761 F.3d 789, 791 (7th Cir. 2014) (quoting *Assessment Techs. of Wis., LLC v. WIREdata, Inc*., 361 F.3d 434, 436 (7th Cir. 2004)); *see also Moffat*, 2017 WL 4217174, at *2 (quoting same). This means that "[i]f the case was a toss-up and the prevailing party obtained generous damages, or injunctive relief of substantial monetary value, there is no urgent need to add an award of attorneys' fees." *Klinger*, 761 F.3d at 791 (quoting *Assessment Techs.,* 361 F.3d at 436). On the other hand, if "the claim or defense was frivolous and the prevailing party obtained no relief at all, the case for awarding attorneys' fees is compelling." *Id*.

In particular, the Seventh Circuit affords "defendants who prevail against copyright claims a 'strong presumption' that they are entitled to attorneys' fees." *Timothy B. O'Brien*, 962 F. 3d at 350 (quoting *Assessment Techs.*, 361 F.3d at 437); *see also Klinger*, 761 F.3d at 791 (same). This rule avoids forcing a defendant to enter into "a nuisance settlement" and abandon meritorious defenses. *Klinger*, 761 F.3d at 791 (quoting *Assessment Techs.*, 361 F.3d at 437); *Moffat*, 2017 WL 4217174, at *2. With this analytical framework in mind, the court turns to the relevant discretionary factors. However, because that presumption is not dispositive, the

remaining factors require analysis. *See O'Brien*, 962 F.3d at 351 ("[O]ur caselaw has never held that the strong presumption was insurmountable; rather, we have consistently required a fact-specific, case-by-case inquiry.").

1. Strength of the Parties' Respective Positions

Defendants were obviously the prevailing party at trial because the copyright claim at the heart of this case was decided in their favor, and having made no affirmative recovery, defendants are entitled to a presumption favoring an award of their fees under the Seventh Circuit's guidance. The strength of plaintiffs' case is also a factor that weighs *slightly* in favor of awarding fees to defendants. At trial, the parties agreed that: (1) the Hodag logos are the subject of a valid copyright covering the images used by defendants; (2) one of the plaintiffs owns the copyright; and (3) defendants copied protected expression in or prepared derivative works based on the copyrighted work.

Accordingly, the only issue at trial was whether defendants were authorized to use the copyrighted work. Plaintiffs' position was that Tracy Ehmann provided defendants with a limited license agreement on May 1, 2009, for the use of a 2-D rendering of her copyrighted, 3-D Hodag statue for satisfaction of an undisputed debt, but that defendants then overreached that agreement and used other, unauthorized copyrighted designs. Defendants denied ever executing a licensing agreement for the 2-D rendering, which they already had access to through the Rhinelander Area Chamber of Commerce, and alleged instead that Tracy Ehmann had granted them an implied, verbal license to use the copyrighted Hodag logos to satisfy her unpaid debt. Considering this one question -- whether plaintiff Tracy Ehmann granted defendants a limited license to use a 2-D rendering or an implied, unlimited license in the copyrighted work generally -- the jury answered in defendants' favor.

Although plaintiffs' claims were certainly facially plausible, their case was substantively weak because they had little evidence to support their assertion that defendants exceeded a valid, limited 2009 license, including no signed copies of key documents or witnesses to corroborate Tracy's account, however credible she was on the stand. Plus, plaintiffs Tracy and Eric Ehmann both testified that the signed, limited license agreement *and* all of the documents related to Tracy's supposed conveyance of her copyright interests to Eric were destroyed in a flood in 2010.

Although plaintiffs were able to present a copy of a computer file with an unsigned version of the licensing agreement that the parties allegedly executed, their own expert testified that the agreement had been edited in July 2009, *after* the document allegedly went into effect in May 2009. Defendants also presented persuasive evidence that the 2-D rendering was useless to them because they could not screenprint it on shirts and other merchandise, *and* they already had access to nearly identical trademarked logos as a member of the Rhinelander chamber of commerce, who commissioned Tracy to produce that rendering for its members use. Finally, defendants correctly pointed out that the two cease and desist letters sent by Eric Ehmann to defendants approximately 10 years later did not mention the alleged licensing agreement. Combined with Eric's somewhat confusing testimony, which was less credible than Tracy's, the jury obviously accepted defendants' version of events.

Still, the evidence that defendants presented in support of their claim that Tracy Ehmann gave them a sweeping verbal permission to use her logos to satisfy an outstanding debt was also largely limited to their own testimony. Specifically, defendants testified that: (1) Tracy approached them in the second week of February 2008, stating that she was

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.