

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UMG RECORDINGS, INC., et al.,)	
)	
Plaintiffs,)	
)	
vs.)	No. 1:17-cv-00365-DAE
)	
GRANDE COMMUNICATIONS)	
NETWORKS LLC,)	ORAL ARGUMENT REQUESTED
)	
Defendant.)	

**DEFENDANT GRANDE COMMUNICATIONS NETWORKS LLC'S OPPOSITION TO
PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND INTEREST**

Considering the windfall \$46.8 million award of statutory damages in this case, the Court should reject Plaintiffs' request for an additional \$5.2 million in attorneys' fees, \$7.3 million in prejudgment interest, and nearly \$200,000 in expert costs.

Under the Copyright Act, Plaintiffs' ability to recover attorneys' fees and prejudgment interest is committed to the Court's discretion. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 203 (2016); *Powell v. Penhollow*, 260 F. App'x 683, 691 (5th Cir. 2007). The Court should exercise that discretion to deny Plaintiffs' request for an additional recovery of nearly \$13 million. Plaintiffs have already obtained a recovery that far exceeds any reasonable estimation of actual harm they suffered—indeed, Plaintiffs never even attempted to prove the amount of any loss. Thus, there is no rationale supporting an additional monetary award. *See, e.g., Sullivan v. Flora*, 936 F.3d 562, 575-76 (7th Cir. 2019) (affirming denial of fees to copyright plaintiff that won a “substantial verdict” because “no further compensation or deterrence in the form of an attorneys' fee award was necessary”) (cleaned up).

Relatedly, there is no merit to Plaintiffs' suggestion that Grande's defense of the case was unreasonable. Grande is confident the Court, having presided over the multi-week trial in this matter, will reject that assertion. This case presented difficult, complex legal and factual issues that remained unresolved until trial. This included determining the appropriate standards for proving direct and contributory copyright infringement in a case against an internet service provider, as well as evaluating Rightscorp's ability to detect and offer competent evidence of direct copyright infringement. For these reasons, at summary judgment, the Court concluded that there were multiple genuine issues of material fact for trial and denied Plaintiffs' motion for summary judgment on liability in its entirety. *See* Mar. 15, 2019 Order at 52-53 (ECF No. 268).

This was a close case. The Court should therefore deny Plaintiffs’ request for additional recovery of fees, prejudgment interest, and expert costs. Considering the amount at stake and the complexity of the issues, Grande respectfully requests in-person oral argument.

I. NEARLY \$50 MILLION IN STATUTORY DAMAGES IS MORE THAN SUFFICIENT TO COMPENSATE PLAINTIFFS

All available evidence shows that the jury’s \$46.8 million award of statutory damages already represents a windfall recovery for Plaintiffs.

Plaintiffs repeatedly and consistently refused to attempt to quantify any harm they suffered from the contributory copyright infringement at issue in this case. Plaintiffs did not offer any evidence of the value of their 1,400 copyrighted songs—no revenue figures from digital or physical sales, no statistics about the volume or frequency with which the songs were sold or streamed, and no evidence from which anyone could gauge the relative worth of certain works as compared to others. As far as the trial record is concerned, there is no evidence that any of these individual songs have *any* economic value.

The evidence that *does* exist shows that any lost revenues are a small fraction of the jury’s award. At trial, Plaintiffs’ damages expert, Dr. William Lehr, did not offer any opinions about Plaintiffs’ lost profits or revenues, or about the value of their works.¹ Instead, Dr. Lehr’s opinions focused on Grande—specifically, Grande’s supposed “economic incentives” to permit copyright infringement on its network, without regard to the specific works or acts of infringement at issue.

¹ Dr. Lehr claimed it was “impossible” to quantify Plaintiffs’ harm because he could not quantify the amount of downstream infringement that occurred—*i.e.*, once a given BitTorrent user shares a file, the recipient may share the file with another person, and so and so on. *See, e.g.*, Trial Tr. (Day 7), 1111:3-1112:17 (ECF No. 470). But in doing so, Dr. Lehr was describing downstream acts of infringement for which Grande could not be liable in any event, because they were committed (if at all) by users of other ISP networks.

In Dr. Lehr's opinion, these incentives ranged from \$50 to \$80 million. Dr. Lehr arrived at this \$50 to \$80 million range by calculating the "lifetime value" of an individual Grande subscriber (\$2,500 to \$3,800), which included revenues Grande would receive from cable television and phone service as well as internet service. Then, Dr. Lehr multiplied the "lifetime value" by the number of Grande subscribers accused of copyright infringement more than twice since 2013 (over 20,000). *See* Trial Tr. (Day 7), 1121:23-1125:1 (ECF No. 470). This included notices sent by companies and rightsholders other than Rightscorp, and it included notices about music, movies, TV shows, pornography, and video games not at issue in this case.

As a matter of common sense, any monetary harm suffered by Plaintiffs is much smaller than Dr. Lehr's \$50 million figure. While Dr. Lehr arrived at this number based on over 20,000 Grande subscribers he claimed Grande should have terminated, one of Plaintiffs' other experts indicated that Rightscorp only accused approximately 5,000 Grande users of infringing works in suit during the damages period. *See* Trial Tr. (Day 9), 1527:18-1528:2 (ECF No. 472); *see also* Ex. 1 (Bardwell Supp. Report) at 2 (table identifying 4,622 "Verified Accounts With Asserted Works"). The number of Grande users from whom Rightscorp claimed to have been able to download a file was a small fraction of that—around 500. Trial Tr. (Day 10), 1790:3-23 (ECF No. 473). And of course, Plaintiffs' lost revenues from an individual who shared a song over the internet would be far less than Dr. Lehr's \$2,500 "lifetime subscriber value," considering that Plaintiffs' *entire catalogs* were available to stream for \$10 per month. *See* Trial Tr. (Day 7), 1137:17-22 (ECF No. 470).

There was additional evidence at trial that Plaintiffs' actual damages were far less than the \$47 million statutory damages award. For example, if one treats each of Rightscorp's 1.35 million copyright infringement notices to Grande as a lost sale, it was undisputed that Plaintiffs'

total lost revenues would be \$1.2 million. *See* Trial Tr. (Day 9), 1530:8-1531:7 (ECF No. 472). Even this calculation is extremely favorable to Plaintiffs because (1) it overcounts the number of lost sales, as many of the notices concerned the same subscriber offering to share the same song; (2) it includes roughly one million notices about works not in suit and works not owned by Plaintiffs; and (3) it includes hundreds of thousands of notices sent before April 2014, the beginning of the damages period.² If one performs this same calculation but limits it to Rightscorp's notices about the works in suit, Plaintiffs' lost revenues from download sales would be roughly \$300,000, and the number is even less if one considers Rightscorp's notices to represent lost revenues from streaming. *Id.* at 1532:7-14, 1533:13-1535:19.

In sum, the jury's award of \$46.8 million in statutory damages is more than sufficient to compensate Plaintiffs for any damages caused by infringement of the works in suit on Grande's network. Therefore, as discussed in more detail below, the Court should exercise its discretion and decline to award Plaintiffs any additional relief.

II. THE COURT SHOULD DENY PLAINTIFFS' REQUEST FOR OVER \$7.3 MILLION IN PREJUDGMENT INTEREST

A. Prejudgment Interest on Statutory Damages Is Inappropriate

The Fifth Circuit has not addressed the question of whether prejudgment interest is available under the Copyright Act, and other circuits are split. *See Powell*, 260 F. App'x at 691 & n.7. This case, however, presents a narrower question: whether prejudgment interest should be available on an award of *statutory damages*. The answer is no.

² Again, to the extent Plaintiffs claim that this ignores downstream acts of infringement, that is immaterial because Grande cannot be liable for copyright infringement on the networks of other ISPs.

When confronted with this issue, district courts—specifically district courts in Texas—routinely refuse to award prejudgment interest on statutory damages. See *Malibu Media, LLC v. Gonzales*, No. 4:16-cv-2406, 2017 WL 2985641, at *6 (S.D. Tex. July 13, 2017) (“[P]recedent of this court is that pre-judgment interest is not available on an award comprised entirely of statutory damages under 17 U.S.C. § 504(c.)”); *Granville v. Suckafree Records, Inc.*, No. 4:03-cv-3002, 2006 WL 2520909, at *6 (S.D. Tex. June 28, 2006) (same); *Blackmer v. Monarch Holdings (USA) Inc.*, No. 4:00-cv-4290, 2002 WL 32361935, at *5 (S.D. Tex. July 11, 2002) (“The Court determines that Plaintiff may not recover prejudgment interest on his recovery of statutory damages under the Copyright Act.”).

This is because statutory damages are not compensatory, and instead may be awarded in the absence of any actual harm. As a result, the reasoning for allowing prejudgment interest—to compensate the plaintiff for the lost opportunity to use the money reflected in a compensatory award³—does not apply. See, e.g., *GC2 Inc. v. Int’l Game Tech.*, 391 F. Supp. 3d 828, 856-57 (N.D. Ill. 2019) (denying prejudgment interest on statutory damages because “the amount of the underlying statutory award is itself discretionary and can be set a figure which compensates the plaintiff for, among other things, the time that has elapsed since the defendant infringed her rights”); *Broad. Music, Inc. v. Nortel Grill, Inc.*, No. 1:89-cv-1278, 1991 WL 172079, at *2 (W.D.N.Y. Aug. 27, 1991) (“[W]hen courts have granted prejudgment interest, the underlying awards were based, in full or in part, on actual damages and/or profits, not on statutory damages alone.”); see also *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 51

³ See, e.g., *Murray v. Shaw Indus., Inc.*, 990 F. Supp. 46, 48 (D. Mass. 1997) (“Prejudgment interest compensates the plaintiff for the loss of the use of money that would have been hers but for the wrongful conduct of the defendant.”).

(1st Cir. 2003) (adopting the “sound” reasoning that “prejudgment interest was inappropriate where the entire damages award was composed of disgorged profits from an infringer, because, unlike actual damages, the plaintiff never had those funds and so deserved no compensation for the lost use of the money while the case was pending”); *Walden v. City of Providence*, No. 1:04-cv-304, 2008 WL 8867010, at *4 (D.R.I. May 15, 2008) (collecting cases denying prejudgment interest on statutory damage awards). Furthermore, an award of prejudgment interest is unnecessary to further the purposes of the Copyright Act, because section 504(c) already provides a maximum amount of damages without regard to interest. *See Granville*, 2006 WL 2520909, at *6 (“Nor would an award of prejudgment interest in this case advance the congressional policies of the Copyright Act, given that, in the absence of actual damages, Congress has specifically capped the amount of damages that a plaintiff can recover for willful infringement at \$150,000, without any express provision for prejudgment interest thereon.”).

Here, the jury’s \$46.8 million award was comprised entirely of statutory damages. *See* Verdict (ECF No. 458). The Court should therefore follow the above authorities and decline to award additional prejudgment interest.

B. The Award of Statutory Damages Already Provides Full Compensation

Even if the Court finds that prejudgment interest on statutory damages is sometimes permissible, the Court should still deny Plaintiffs’ request because the jury’s \$46.8 million award was more than sufficient to make Plaintiffs whole.

As discussed above, the jury’s \$46.8 million award far exceeds any actual damages suffered by Plaintiffs. *See* Section I. Courts frequently deny prejudgment interest under the Copyright Act where the plaintiff has not shown that interest is necessary to make the plaintiff whole. *See Granville*, 2006 WL 2520909, at *6 (“The \$150,000 damages award is a statutory

sum, rather than an approximation of any damages suffered by Plaintiff or any profits to Defendants from the unauthorized use of Plaintiff's musical composition, and there is no evidence that the damages award is insufficient to provide full compensation to Plaintiff."); *Shell v. Lautenschlager*, No. 1:15-cv-1757, 2018 WL 4636457, at *5 (N.D. Ohio Sept. 27, 2018) (denying request for prejudgment interest on statutory damages, noting the absence of "any evidence of actual damages or lost profits" and concluding that "an award of prejudgment interest here would allow plaintiff to recover funds that would not otherwise have been hers"); *Capitol Records, Inc. v. MP3tunes, LLC*, No. 1:07-cv-9931, 2015 WL 13684546, at *4 (S.D.N.Y. Apr. 3, 2015) ("The sizable damages [of \$11 million in statutory damages] already levied against [defendants], without the addition of pre-judgment interest, are sufficient to fully compensate Plaintiffs for their injuries."); *Brighton Collectibles, Inc. v. Coldwater Creek Inc.*, No. 3:06-cv-1848, 2009 WL 160235, at *5 (S.D. Cal. Jan. 20, 2009) (denying prejudgment interest because "the jury award adequately compensates [the plaintiff] for the damages in this case"); *Broadcast Music*, 1991 WL 172079, at *2 ("In the absence of any showing of inadequate compensation or of any law clearly directing otherwise, this Court opines that an award of prejudgment interest on statutory damages is inappropriate."); *see also Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 282 (6th Cir. 1988) (vacating award of prejudgment interest because the damages awarded were "clearly sufficient to promote innovation" and "deter unauthorized exploitation of someone else's creative expressions").

In other, non-copyright contexts, the Fifth Circuit has likewise recognized that it is appropriate to deny prejudgment interest where the plaintiff has failed to show it is necessary for full compensation. *See Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 679 (5th Cir. 2015) (affirming denial of prejudgment interest because the plaintiff "has already been made more than

whole on the damages it could prove, and it has not shown that the prejudgment interest would exceed that extra recovery”); *see also Williams v. Trader Pub. Co.*, 218 F.3d 481, 488 (5th Cir. 2000) (“A district court has discretion to impose a pre and post-judgment interest award to make a plaintiff whole.”).

Plaintiffs’ cited authorities do not suggest otherwise. Indeed, in their primary case (notably, a default judgment case), the district court awarded prejudgment interest because the amount of statutory damages was less than the defendant’s revenues from selling the infringing products. *See R A Guthrie Co. v. Boparai*, No. 4:18-cv-80, 2021 WL 1148957, at *19 (E.D. Tex. Mar. 1, 2021) (exercising discretion to award prejudgment interest “to make the plaintiff ‘whole’”). Moreover, the jury’s willfulness finding is immaterial to whether prejudgment interest should be awarded because that finding is already factored into the heightened statutory damages. *See Richard Feiner & Co. v. Turner Entm’t Co.*, No. 1:96-cv-1472, 2004 WL 2710054, at *2 (S.D.N.Y. Nov. 23, 2004) (denying request for prejudgment interest because “the willfulness finding has already been factored into the statutory damages award”).

In their motion, Plaintiffs presented no evidence that prejudgment interest is necessary to fully compensate them for any actual damages they suffered. Plaintiffs’ assertion that \$7.3 million in interest would “appropriately compensate Plaintiffs without creating a windfall” is completely unsupported (*see* Pls.’ Memo. ISO Mot. for Attorneys’ Fees & Interest (“Pls.’ Memo.”) at 20 (ECF No. 486-1)) and is contrary to the evidence at trial. *See* Section I. Accordingly, the Court should exercise its discretion and deny Plaintiffs’ request for prejudgment interest.

C. If Prejudgment Interest Is Awarded, It Should Be at the Federal Rate

For the reasons discussed above, the Court should not award prejudgment interest. However, if the Court decides otherwise, the Court should use the federal interest rate set forth in 28 U.S.C. § 1961(a) instead of the 5% rate used by Texas state courts. *See Powell*, 260 F. App'x at 691 (“When a cause of action arises out of a federal statute, federal law governs the award of prejudgment interest—both as to its allowance and its rate.”) (citing *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1288 (5th Cir. 1994) (approving award of prejudgment interest at section 1961 rate in WARN Act case)); *see also Superior Derrick Servs., L.L.C. v. Lonestar 203*, 547 F. App'x 432, 443 (5th Cir. 2013) (“The district court here acted well within its discretion by ordering a rate established pursuant to 28 U.S.C. § 1961.”); *Williams*, 218 F.3d at 488 (district court’s use of state law interest rate in federal question case may have been error); *Dweck v. Amadi*, No. 1:10-cv-2577, 2011 WL 3809907, at *6 (S.D.N.Y. July 26, 2011) (in copyright infringement case, denying request for prejudgment interest at a rate “predicated upon New York State law” and instead using the rate for post-judgment interest in 28 U.S.C. § 1961).

Using Plaintiffs’ specified interest period, with the rate in effect the week before Plaintiffs filed their Complaint,⁴ the applicable rate would be 1.04% and the total prejudgment interest would be \$1,532,393.88.

⁴ Because the purpose of prejudgment interest is to make the plaintiff whole for the lost use of money, it is appropriate to use the rate in effect at the beginning of this period. Plaintiffs request interest from April 21, 2017 (the date they filed their Complaint) to February 24, 2020 (the previous trial date canceled because of the pandemic), and from October 12, 2022 (the first day of trial) to January 29, 2023 (the day before entry of judgment). Pls.’ Memo. at 20.

III. THE COURT SHOULD DENY PLAINTIFFS' REQUEST FOR OVER \$5 MILLION IN ATTORNEYS' FEES

Under the Copyright Act, 17 U.S.C. § 505, district courts are “grant[ed] wide latitude to award attorney’s fees based on the totality of circumstances in a case.” *Kirtsaeng*, 579 U.S. at 203. “[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.”⁵ *Id.* at 202. Furthermore, district courts “may not treat prevailing plaintiffs and prevailing defendants any differently; defendants should be encouraged to litigate meritorious copyright defenses to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Id.* (cleaned up). In deciding whether to award fees in a copyright case, courts in the Fifth Circuit look to the following non-exclusive factors: “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.” *Virgin Records Am., Inc. v. Thompson*, 512 F.3d 724, 726 (5th Cir. 2008) (affirming denial of fees to prevailing copyright plaintiff).

Considering these factors, the Court should order the parties to bear their own fees. Grande’s defense was neither frivolous nor unreasonable—the closely contested trial resolved a number of difficult, close, and complex factual and legal issues that went directly to liability. The award of nearly \$50 million in statutory damages greatly exceeds any actual damages Plaintiffs may have suffered and is more than sufficient to achieve any necessary deterrent effect. The Court should therefore exercise its “wide latitude” to deny Plaintiffs’ request for over \$5 million in attorneys’ fees. *See Kirtsaeng*, 579 U.S. at 203.

⁵ It is difficult to reconcile this requirement with the Fifth Circuit’s assertion that an award of fees to the prevailing party “is the rule rather the exception.” *See, e.g., Digital Drilling Data Sys., L.L.C. v. Petrolink Servs., Inc.*, 965 F.3d 365, 386 (5th Cir. 2020).

A. Grande's Defense Was Objectively Reasonable

As the Supreme Court recognized in *Kirtsaeng*, “[a] district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable claim or defense.” 579 U.S. at 206. Considering how the trial progressed, Grande respectfully submits that the answer to this question is no.

At the conclusion of trial, after the jury returned its verdict for Plaintiffs, the Court complimented the “extraordinarily good lawyering in this case from all sides” and volunteered that the case was “well tried by both sides.” Trial Tr. (Day 14), 2182:12-2183:8 (ECF No. 477). The Court also noted that the Court’s “rulings . . . will be tested obviously [on appeal] and that’s just the way it’s supposed to be.” *Id.* at 2183:8-9. These comments refute the notion that the Court believed that Grande’s defense was unreasonable. *See Kirtsaeng*, 579 U.S. at 206.

Moreover, prior to trial, the Court denied Plaintiffs’ motion for summary judgment on their contributory copyright infringement claim. *See* Mar. 15, 2019 Order at 52-53 (ECF No. 268). The Court specifically recognized that there were genuine issues of material fact for trial regarding whether Plaintiffs could prove direct infringement by Grande’s subscribers, and regarding whether Plaintiffs could prove Grande’s knowledge of specific instances of direct infringement by specific subscribers. *Id.* at 52. This further refutes the notion that Grande pursued an unreasonable defense.

Furthermore, key legal and factual issues in this case were not resolved until trial. These issues included:

- The standard for proving direct infringement of Plaintiffs’ distribution rights through digital file sharing (specifically, whether actual transmission of a file is required);
- Whether the Rightscorp system and evidence could satisfy that standard, considering (among other things) that Rightscorp did not preserve any of the evidence collected in connection with the copyright complaints it sent to Grande;

- Whether Rightscorp’s email notices to Grande were sufficient to confer knowledge of direct infringement, considering the disputed reliability of the Rightscorp system and the fact that Grande had no way to vet their accuracy;
- Whether and to what extent Plaintiffs would be permitted to offer evidence and argument regarding Grande’s failure to qualify for the DMCA safe harbor, 17 U.S.C. § 512(a), given that section 512(l) provides that such failure “shall not bear adversely” on any other defense by an internet service provider;
- Whether Plaintiffs would be permitted to offer evidence and argument that the plaintiff in *BMG v. Cox* obtained a favorable jury verdict based on Rightscorp evidence, notwithstanding the fact that the verdict was reversed on appeal;
- The conduct by Grande necessary to support contributory liability, and specifically whether liability can be proved in the absence of evidence of statements or actions directed to promoting infringement;
- Whether Grande’s conduct in providing internet access to subscribers accused of copyright infringement, without more, constituted inducement or encouragement of, or material contribution to, direct infringement;
- Whether Plaintiffs would be permitted to introduce evidence of the alleged infringement of works not at issue in this case and/or that occurred before the damages period; and
- Whether each of the roughly 1,500 sound recordings at issue in the case was eligible for a separate award of statutory damages under 17 U.S.C. §§ 412 and 504(c)(1), considering the disputed timing of any direct infringement, the registering of many works as parts of compilations, and the identification of virtually all songs in suit as works made for hire.⁶

In terms of the facts, a significant part of Grande’s defense—and the trial more broadly—concerned the accuracy and reliability of the Rightscorp system. Indeed, at trial, the Court offered its personal view that the liability decision would ultimately come down to whether the jury believed the Rightscorp evidence was sufficiently reliable. *See* Trial Tr. (Day 11), 1906:9-22 (ECF No. 474). This required the jury to consider many complex technical issues concerning

⁶ On this point, Grande notes that the burden is on the plaintiff to satisfy section 412 in order to obtain an award of attorneys’ fees. Grande has moved for JMOL on grounds that Plaintiffs did not meet this burden. *See* Grande’s Renewed Motion for JMOL or New Trial at 12 (ECF No. 487).

the functioning of the software, the data Rightscorp collected from BitTorrent users, and the evidence Plaintiffs and Rightscorp were able to offer at trial to support their claims. It bears emphasizing that it was undisputed that Rightscorp deleted, prior to trial, the bitfield evidence underlying its copyright infringement notices that would definitively show whether its notices were accurate. *See, e.g.*, Trial Tr. (Day 2), 418:12-15 (ECF No. 465); Trial Tr. (Day 4), 732:5-21 (ECF No. 467); Trial Tr. (Day 10), 1796:16-22 (ECF No. 473). For this reason alone, it was reasonable for Grande to mount a defense challenging the reliability of the Rightscorp evidence.

Plaintiffs recognized that the adequacy and credibility of the Rightscorp evidence was a key issue, spending nearly 10 hours of trial time with Greg Boswell (Rightscorp witness), Barbara Frederiksen-Cross (their technical expert), and Dr. Geoff Cohen (Grande's technical expert). Grande spent another seven-plus hours with those same witnesses. The sufficiency of the Rightscorp evidence was a close issue, and Grande's decision to let the jury decide it was reasonable and non-frivolous.

Plaintiffs effectively ignore all of these factual and legal issues, and instead focus on a cherry-picked set of issues resolved prior to trial,⁷ such as Grande's DMCA safe harbor defense,

⁷ Although it relates to another ancillary issue, Grande is obligated to respond to Plaintiffs' suggestion that Grande somehow acted improperly with respect to the trial testimony of their expert Barbara Frederiksen-Cross concerning the Audible Magic system. *See* Pls.' Memo. at 13. At the outset of trial, the Court ordered that Ms. Frederiksen would be permitted to offer opinions about Audible Magic based on source code and other materials not produced in the litigation, so long as Plaintiffs made those materials available during trial. Trial Tr. (Day 2), 240:21-242:4 (ECF No. 465). After Grande repeatedly identified issues with the completeness of the information provided, Grande encountered severe gamesmanship when Audible Magic would only make the software available remotely during the middle of the night, with virtually no advance notice. Trial Tr. (Day 10), 1633:9-1634:14 (ECF No. 473). Ultimately, Grande determined that it was simply not possible to organize and conduct a detailed software review in the midst of trial, particularly given Audible Magic's obstructive conduct, and so Grande decided not to spend additional trial time on the matter.

whether Plaintiffs would be permitted to file two summary judgment motions, and garden-variety discovery disputes. Irrespective of how or whether those issues were raised and decided before trial, the fact remains that Grande had reasonable defenses that it could and did present at trial. Contrary to Plaintiffs' claims, the jury's finding of willful contributory infringement does not mean that Grande's defense was unreasonable. *See Sullivan v. Flora, Inc.*, No. 3:15-cv-298, 2018 WL 3210511, at *10 (W.D. Wis. June 29, 2018) ("The fact that the jury ultimately rejected [the defendant's joint works] defense and found defendant's copyright infringement was willful does not undermine its objective reasonableness."), *aff'd in relevant part*, 936 F.3d 562 (7th Cir. 2019); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 463 (D. Md. 2004) (denying fees where defendant was found liable for willful infringement because the litigation was "likely to clarify the law" and the defendant "presented non-frivolous defenses at trial").

Grande's presentation of an objectively reasonable defense is entitled to "substantial weight" and strongly counsels in favor of denying Plaintiffs' request for fees. *See, e.g., Kirtsaeng*, 579 U.S. at 208 ("Courts every day see reasonable defenses that ultimately fail (just as they see reasonable claims that come to nothing); in this context, as in any other, they are capable of distinguishing between those defenses (or claims) and the objectively unreasonable variety."); *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 382-83 (5th Cir. 2004) (affirming denial of attorneys' fees in copyright infringement suit involving complex issues where losing party's positions were asserted in good faith), *abrogated in part on other grounds, Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Sullivan*, 936 F.3d at 575-76 (affirming denial of fee application where district court "saw the case as close on the merits and hard fought by the parties").

B. There Was No Finding that Grande Knew It Was Engaged in Contributory Copyright Infringement

There is no merit to Plaintiffs' suggestion that fees are necessary because of Grande's "intentional flouting of and disdain for the law." *See* Pls.' Memo. at 13-14. To be sure, in a typical copyright case, the standard for willful infringement requires the plaintiff to show either (1) the defendant knew *its own conduct* constituted copyright infringement or (2) the defendant recklessly disregarded the plaintiff's rights. *See* Mar. 15, 2019 Order at 43 (ECF No. 268) ("Willfulness thus requires a showing that Grande knew its conduct constituted copyright infringement or acted with reckless disregard of Plaintiffs' rights as copyright holders."); *see also* ECF No. 439 at 3 (collecting cases).

But here, at Plaintiffs urging, the Court softened the first prong of the standard, and only required Plaintiffs to show that Grande knew that "*its subscribers' actions* constituted infringement." Jury Instructions at 23 (ECF No. 449) (emphasis added). As a result, there was never any finding in this case that Grande knowingly committed contributory copyright infringement. Plaintiffs cannot have it both ways—having successfully advocated for a lower willfulness standard, they cannot act as if they proved that Grande intentionally engaged in contributory infringement of their copyrights.

Furthermore, Plaintiffs are wrong to rely on the fee award in *BMG v. Cox*. In that case, the jury awarded \$25 million in damages for willful contributory infringement of roughly the same number of songs, and the district court found that an additional award of \$8.3 million in fees would serve a deterrent purpose. *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 234 F. Supp. 3d 760, 768-69 (E.D. Va.), *rev'd on other grounds*, 881 F.3d 293 (4th Cir. 2018). Thus, the total recovery in *BMG*—which, again, was reversed on appeal—was approximately \$33 million, which is substantially less than the \$46.8 million verdict in this case. In this case, there is no reason to

believe that it is necessary to further increase the jury's award to achieve a deterrent effect.

The *BMG* court also specifically noted that the award was intended to incentivize Cox "to change its behavior," for example by adopting "a more robust and effective DMCA program" or through "a different response to infringement notices from companies like Rightscorp." 234 F. Supp. 3d at 769. Here, in contrast, the evidence at trial showed that Grande adopted a DMCA termination policy shortly before the lawsuit was filed, under which Grande has been terminating the internet access of accused infringers. *See, e.g.*, Trial Tr. (Day 5), 963:11-17, 972:3-10 (ECF No. 468); Trial Tr. (Day 8), 1257:18-25 (ECF No. 471). Plaintiffs have not claimed that Grande's current DMCA policy is insufficient. And as for Rightscorp, it has stopped sending copyright notices to Grande, and so Grande's response to Rightscorp's notices is a moot point.

In sum, there is no concrete, non-speculative reason to believe that an additional award of attorneys' fees is necessary to deter future infringement by Grande or anyone else. Grande pursued a reasonable defense in this case, and significant issues remain to be resolved through post-trial motions and, if necessary, appeal.

C. The Award of Statutory Damages Already Exceeds Any Actual Harm

As discussed in detail in Section I above, the jury's award of \$46.8 million in statutory damages is a windfall recovery for Plaintiffs. Plaintiffs did not offer any evidence of the value of their copyrights, did not offer any evidence that Grande's conduct impacted that value, and did not offer any evidence of lost revenues or profits that resulted from Grande's conduct. Accordingly, the Court should exercise its discretion and deny Plaintiffs' request for attorneys' fees. *See, e.g., Sullivan*, 936 F.3d at 575-76 (affirming denial of fees to copyright plaintiff that won a "substantial verdict" because "no further compensation or deterrence in the form of an attorneys' fee award was necessary") (cleaned up); *Virgin Records*, 512 F.3d at 727 (affirming

denial of fees in copyright case where district court concluded that awarding fees “would not advance considerations of compensation and deterrence”); *Granville*, 2006 WL 2520909, at *5 (denying motion for attorneys’ fees in copyright infringement suit, noting, among other things, “the absence of any particular circumstances that require an award of attorney’s fees to deter Defendants from further copyright violations or additionally to compensate Plaintiff”).

D. If Fees Are Awarded, the Court Should Order a Reduction

For all of the reasons set forth above, the Court should decline to award Plaintiffs attorneys’ fees in this case. In the event the Court decides otherwise, Grande will not trouble the Court with a line-by-line review of time entries, but instead asks the Court to reduce Plaintiffs’ fee request by 20% to account for “the most critical factor in determining the reasonableness of attorneys’ fees”—“the degree of success obtained.” *See Fessler v. Porcelana Corona De Mexico, S.A. de C.V.*, 23 F.4th 408, 418 (5th Cir. 2022) (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)).

Specifically, “when the suit is for damages, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.” *Id.* at 418-19 (cleaned up). The Fifth Circuit “has dutifully applied that rule.” *Id.* at 419 (collecting cases). Here, Plaintiffs’ counsel obtained an award of \$46.8 million in statutory damages, or approximately \$33,000 per sound recording at issue. This award was less than 25% of the amount of statutory damages Plaintiffs could have recovered (1,403 songs x \$150,000 = \$210,450,000). Moreover, the jury’s award of \$33,000 per sound recording stands in stark contrast to the results obtained by Plaintiffs’ other counsel in the *Sony v. Cox* litigation, in which Plaintiffs presented similar claims against an ISP and the jury awarded **\$99,830** per work infringed, or three times as much. *See Ex. 2 (2019 Sony v. Cox Jury Verdict)*.

Thus, considering that Plaintiffs’ counsel obtained less than 25% of the statutory damages they were seeking, and approximately 33% of the per-work statutory damages awarded to Plaintiffs in a recent comparable case, Grande respectfully submits that a modest 20% reduction would be warranted, from \$5,192,627.19 to \$4,154,101.75. *See, e.g., BMG*, 234 F. Supp. 3d at 785 (applying a 20% discount to BMG’s fee request “for improper billing entries and a reduced degree of success”); *J.V.O. ex rel. R.V.O. v. Fulton Cnty. Sch. Dist.*, No. 1:19-cv-1192, 2020 WL 10180672, at *6 (N.D. Ga. July 1, 2020) (applying 20% reduction where plaintiff obtained 20% of damages sought); *Willoughby v. Youth Villages, Inc.*, 219 F. Supp. 3d 1263, 1271 (N.D. Ga. 2016) (applying 25% reduction where plaintiff obtained less than 50% of damages sought); *Asbun v. Resende*, No. 0:15-cv-61370, 2016 WL 7635459, at *9 (S.D. Fla. Sept. 26, 2016) (applying 30% reduction where plaintiff obtained less than 40% of damages sought).

IV. THE COURT SHOULD DENY PLAINTIFFS’ REQUEST FOR ADDITIONAL EXPERT COSTS PURSUANT TO JUDGE AUSTIN’S JULY 16, 2019 ORDER

Grande does not dispute that Plaintiffs may be entitled to recover certain expert costs pursuant to Magistrate Judge Austin’s July 16, 2019 Order (ECF No. 279).⁸ Judge Austin’s Order permits the recovery of expert costs Plaintiffs incurred in responding to Sections VII and X of the March 8, 2019 supplemental expert report of Grande’s technical expert, Dr. Geoff Cohen, regarding the hard drive of music files Rightscorp claimed to have downloaded from users of Grande’s network. ECF No. 279 at 6-12. However, the *massive* costs Plaintiffs seek to recover—nearly \$200,000—go far beyond that subject matter. Indeed, Plaintiffs hardly even

⁸ As far as Grande is aware, the Court never ruled on Grande’s objections to Magistrate Judge Austin’s Order. *See* ECF No. 285.

attempt to justify recovery of these costs, devoting little more than a sentence of their motion to the issue. *See* Pls.’ Memo. at 12 n.9.

After Judge Austin issued the order in question, Plaintiffs served a February 3, 2020 second rebuttal report from Ms. Frederiksen-Cross. Only a fraction of that report is directed to responding to Sections VII and X of Dr. Cohen’s report—approximately 12 of the 40 pages. *See* Frederiksen-Cross 2nd Rebuttal Report, ¶¶ 66-83 (responding to Section VII), 112-134 (responding to Section X) (ECF No. 397-1).

Nevertheless, Plaintiffs indiscriminately seek recovery of nearly \$200,000 in fees billed by Ms. Frederiksen-Cross’s firm between July 1, 2019 and January 10, 2022, without regard to whether those fees have anything to do with responding to Sections VII and X of Dr. Cohen’s supplemental report. *See generally* Pls.’ Ex. A-2 (ECF No. 486-4). The following entries from a December 5, 2019 invoice are representative:

11/1/2019	BF	Preparing report	3.93	2,063.25
	WT	Reviewing materials	6.10	2,135.00
11/2/2019	BF	Preparing report	3.72	1,953.00
11/5/2019	BF	Preparing report	0.52	273.00
	WT	Reviewing materials	3.00	1,050.00
11/6/2019	WT	Reviewing materials	1.30	455.00
11/7/2019	WT	Reviewing materials	2.80	980.00
11/8/2019	BF	Preparing report	1.35	708.75
11/12/2019	WT	Reviewing materials	3.90	1,365.00
11/13/2019	WT	Reviewing materials	4.30	1,505.00
11/14/2019	WT	Reviewing materials	2.00	700.00
11/15/2019	WT	Reviewing materials	7.30	2,555.00
11/16/2019	WT	Reviewing materials	3.20	1,120.00
11/17/2019	WT	Reviewing materials	4.20	1,470.00
11/18/2019	WT	Reviewing materials	5.00	1,750.00
11/19/2019	WT	Reviewing materials	3.80	1,330.00
11/20/2019	WT	Reviewing materials	6.30	2,205.00
11/21/2019	WT	Reviewing materials	2.40	840.00
11/26/2019	WT	Reviewing materials	3.80	1,330.00
11/27/2019	WT	Reviewing materials	5.50	1,925.00
11/28/2019	WT	Reviewing materials	2.60	910.00
For professional services rendered			77.02	\$28,623.00

See Pls.’ Ex. A-2 at 9-10. To be clear, Plaintiffs are asking the Court to award the entirety of this \$28,623.00 invoice. *See id.* at 2. The other invoices are no clearer—there is nothing in them to show that the work was related to Sections VII and X of Dr. Cohen’s supplemental report, and certain invoices indicate otherwise. *See, e.g., id.* at 12-13 (February 6, 2020 invoice for \$56,040.25 in which many of the entries relate to “Testing BitTorrent”—a different subject).

In sum, Plaintiffs have failed to show that any of the \$191,618.00 in expert costs they are seeking are recoverable under Judge Austin’s July 19, 2019 Order (ECF No. 479). Accordingly, the Court should deny their request in its entirety.

CONCLUSION

For the foregoing reasons, the Court should enter an order denying Plaintiffs’ Motion for Attorneys’ Fees and Interest (ECF No. 486).

Dated: March 15, 2023

By: /s/ Richard L. Brophy

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