

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

BMG RIGHTS MANAGEMENT (US) LLC, and)
ROUND HILL MUSIC LP,)

Plaintiff,)

Case No. 1:14-cv-1611 (LOG/JFA)

v.)

COX ENTERPRISES, INC., COX)
COMMUNICATIONS, INC., and)
COXCOM, LLC,)

Defendants.)

**COX'S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR ATTORNEYS' FEES**

(PUBLIC VERSION – REDACTED)

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I. INTRODUCTION

Cox moves for attorney's fees from Plaintiff Round Hill Music LP ("Round Hill").

Round Hill knew going into this case that it did not own any copyrights. Before the case began, Round Hill, through its agent Rightscorp, sent to Cox massive numbers of communications accusing Cox subscribers of copyright infringements by file-sharing. Dkt. 16 ("Am. Compl.") ¶¶ 4, 14, 21, 22. Early notices claimed that Round Hill Music was the "exclusive copyright owner" of musical compositions. Each bore a declaration under penalty of perjury that Rightscorp was authorized "to act on behalf of the owner of the exclusive rights" that the subscriber allegedly infringed. Then the notices changed dramatically. Beginning in late 2013, Round Hill modified its notices to dodge the question of copyright ownership, stating that Round Hill Music owned *or controlled* the works, and that Rightscorp was authorized to act "in matters involving the infringement" of the works. The change in language, from claimed ownership to the fudging reference to "matters involving the infringement," evidenced Rightscorp's knowledge, as Round Hill's agent, that Round Hill lacked ownership of the works. Whether the accusations were correct, or whether Round Hill owned the works, did not matter. [REDACTED]

Even though it had become clear that Round Hill didn't own the copyrights underlying its notices, Round Hill came into this Court and sued Cox anyway. Round Hill then prevaricated throughout discovery, delaying production of ownership documents until near the end of discovery so that the documents were not reasonably available during expert discovery or at the Round Hill deposition. [REDACTED]

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After Cox finally exposed Round Hill's lack of ownership, Round Hill did not walk away. Instead, Round Hill doubled down by moving for summary judgment on ownership while trying to block Cox from disputing Round Hill's false ownership claims. When it had to face Cox's arguments, Round Hill responded with contrived arguments invoking private-equity financial engineering as an excuse for its knowing assertion of invalid claims. Cox prevailed completely when the Court realized Round Hill owned no copyrights and dismissed its claims.

By contrast to BMG's case, which was complex and addressed a novel issue—namely whether and under what circumstances a conduit Internet service provider can be held liable for accusations of copyright infringements by individuals on an ISP's network—Round Hill's case was literally a non-starter. The point on which Cox defeated Round Hill was not novel at all. The issue was fundamental and obvious: to sue for copyright infringements, a plaintiff must own copyrights.

While few things in this lawsuit have been simple or clear cut, Cox's entitlement to reasonable fees for the defense against Round Hill is manifest. An award to Cox would further the purposes of the Copyright Act by compensating Cox for its defense against false claims and by deterring future plaintiffs who lack copyrights from abusing copyright law for false demands and windfall damages. On the particular facts of this case, the Court should award Cox its attorney's fees against Plaintiff Round Hill.

II. BACKGROUND

A. Round Hill Never Owned or Had Any Exclusive Rights in the Copyrighted Works It Asserted Against Cox.

In 2012, Plaintiff Round Hill, through its agent Rightscorp, began to send notices to ISPs claiming infringement by their account holders or users. Am. Compl. ¶¶ 2, 22; Bridges Dec.

Ex. A. The notices, [REDACTED] represented to

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recipients that Round Hill was the exclusive copyright owner of musical compositions underlying the notices. Bridges Dec. Ex. A; Bridges Dec. Ex. H at 85:9-17, 86:15-18. In the notices Rightscorp's CEO declared under penalty of perjury that Rightscorp had authorization "to act on behalf of the owner of the exclusive rights" the subscribers allegedly infringed. Bridges Dec. Ex. A. In late 2013, Round Hill, through its agent Rightscorp, modified the notices to change the language regarding ownership of the works. The new notices represented that Round Hill "own[ed] or control[ed]" the works. Bridges Dec. Ex. B. The new notices no longer asserted that Rightscorp was authorized to act "on behalf of the owner of exclusive rights," but said it was authorized to act "in matters involving the infringement." *Id.* Both the early and later notices were the basis of Round Hill's suit against Cox. Dkt. 1 ("Or. Compl.") ¶ 4; Am. Compl. ¶ 4.

Round Hill never owned the copyrights it asserted in this case. *See* Dkt. No. 315 ("Gillis Dec."); Gillis Dec. Exs. RH1-RH3. Instead, three key agreements demonstrated that Round Hill merely performed administrative tasks on behalf of the actual owners of the asserted works:

- An Asset Purchase Agreement assigned the works from Round Hill's affiliate, Round Hill Music, LLC, to Round Hill Music Royalty Fund, LP (the "Fund"). Dkt. 703 ("MSJ Order") at 21 (citing Gillis Dec. Ex. RH1).
- A second agreement created a limited partnership with the Fund as General Partner and contemplated the appointment of a "Management Company" to "manage the affairs of the Partnership," as well as a "Copyright Administrator," "defined as 'any Person (including an Affiliate of the General Partner) employed or retained by the Partnership . . . to provide services in connection with the administration, preparation and processing or any similar service of any copyrights owned by, or assigned to, the Partnership,'" including "day-to-day administrative services

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relating to the Partnership’s portfolio.” MSJ Order at 21-22 (quoting and citing the Gillis Dec. Ex. RH2 (the “Fund Agreement”) at 6, 29, 31).

- Finally, the Fund entered into a Management Agreement with Plaintiff Round Hill, and appointed it as Copyright Administrator. *Id.* at 22 (citing Gillis Dec. Ex. RH3 (the “Management Agreement”)).

None of these key agreements contemplated transfer of exclusive rights in the copyrights and none conveyed those rights to Plaintiff Round Hill. Those documents were key (and fatal) to Round Hill’s standing in this case, but Round Hill did not produce them until well after the deadline for substantial completion of document production.

Throughout discovery, Round Hill also obfuscated the identity of the works it asserted against Cox, making it harder for Cox to nail down the ownership problems. *See* Bridges Dec. Ex. D. Initially Plaintiffs submitted a list of only “representative” works, including five works Round Hill allegedly owned. Or. Compl. ¶ 14 & Exhibit A; Am. Compl. ¶ 14 & Exhibit A; Bridges Dec. Ex. D. Later, in response to Cox’s interrogatory seeking identification of Round Hill’s copyrighted works at issue, Round Hill listed 43 works. Bridges Dec. Ex. C. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 19 were registered to no entity or person with any apparent relationship to Round Hill. *See* Gillis Dec. & Appendices A1-A5. Round Hill did not actually own a single copyright in this case, and it never substituted or joined any owner of copyrights underlying its claims.

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B. It Required Painstaking Discovery for Cox to Expose the Fact that Round Hill Did Not Own the Copyrights.

From the beginning, Cox sought discovery about Round Hill’s purported copyright ownership. Cox’s earliest document requests sought documents about Round Hill’s chain of legal title to the copyrights it asserted against Cox. Bridges Dec. Ex. E. The substantial completion deadline for document production was May 14, 2015 (Dkt. 67), but Round Hill did not produce the key agreements until over two months later, just weeks before discovery closed. Bridges Dec. Exs. J, K.¹ Cox had also pressed Round Hill to identify the works that Round Hill administered but for which it did not *own or have any exclusive* copyright rights. And Cox’s deposition topics for Round Hill specifically included Round Hill’s ownership and control of the works at issue and copyrights in them. Bridges Dec. Ex. G (emphasis added); Bridges Dec. Ex. F (identifying as topics Round Hill’s “ownership” (Topic 1) and “control” (Topic 2) “of the Works-At-Issue and copyrights in them, including but not limited to the division of copyright rights between or among [Round Hill] and any other entity”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Despite this admission, the next day Round Hill responded to an interrogatory (and later verified its response under penalty of perjury) by stating it was “not aware

¹ As of June 19, 2015, over a month after the substantial completion deadline, Round Hill had produced only 446 documents (in contrast to Cox’s approximately 35,000). Dkt. 92. Round Hill’s reticence forced Cox to move to compel both Plaintiffs to respond appropriately to, or produce documents in response to, certain discovery requests. *See id.*

[REDACTED]

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of any musical composition at issue in this case for which Round Hill controlled copyrights but did not own or have exclusive rights in the copyrights as of June 25, 2015.” Bridges Dec. Exs. N, O.

At the close of discovery, Round Hill still had not produced documents to support its claim of ownership of the works. The only relevant documents it had produced, the Fund and Management Agreements, demonstrated that Round Hill did not have the rights it needed for a lawsuit against Cox. Cox therefore moved for evidentiary sanctions, and Judge Anderson precluded Round Hill from supporting its ownership claims at trial with any documents it had not produced during discovery without leave of court. Dkts. 248, 290.

C. Round Hill Moved for Summary Judgment on Ownership of the Works at Issue in Spite of Its Admission that It Merely Administered Them.

Instead of withdrawing its claims after admitting that it did not own any copyright in the works it asserted, Round Hill doubled down and moved for summary judgment seeking an order that it owned the works as a matter of law. Dkts. 310, 330. Unable to establish its own standing, Round Hill sought to bulldoze the issue by arguing that Cox lacked standing to dispute Round Hill’s ownership claim. Dkt. 330. The Court then pressed Round Hill to be explicit on the very point it had avoided throughout discovery: the Court directed the parties to submit additional briefing to address Round Hill’s standing argument and “what, if any, exclusive right(s) Round Hill Music, LP holds with respect to the copyrights at issue and the nature of the transfer of those rights from Round Hill Music Royalty Fund, LP” Dkt. 501 at 1.

Based on the parties’ supplemental briefing, the Court not only denied Round Hill’s summary judgment motion on ownership, but also dismissed Round Hill’s entire claim: “[b]ecause Round Hill Music LP does not co-own the copyrights or have an exclusive license for any use of the copyrights, it is without standing to bring this infringement action.” MSJ Order at 26. Ignoring “the *post hoc* label placed on the agreements,” *id.* at 24, the Court found that the

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Management Agreement contained “no other indication aside from the word ‘administration’ that suggests the agreement transferred *any interest at all*.” *Id.* at 23 (emphasis added). “There [wa]s no reference, for example, to any of the actions contemplated by § 106,” but instead “the word ‘administration’ [wa]s surrounded by language that paint[ed] Round Hill Music LP’s role as administrative and acting directly on behalf of the Partnership.” *Id.* The Court concluded that there was “little, if any, indication that these ‘services’” the agreements provided Round Hill would perform “contemplated the transfer [of] *any legally cognizable right in any of the copyrights*, much less that such permission was exclusive.” *Id.* (emphasis added). And further, that “[c]onsidering the preeminence of exclusive rights in copyright cases, it is axiomatic that if the . . . Agreement did not specify that exclusive rights were being transferred, no such rights were in fact transferred.” *Id.* at 23-24 (quoting *John Wiley & Sons, Inc. v. DRK Photo*, 998 F. Supp. 2d 262, 278 (S.D.N.Y. 2014)).

D. Cox Incurred Substantial Fees Defeating Round Hill’s False Copyright Claims.

Cox invested considerable time and effort in discovery pinning down Round Hill’s elusive and false ownership claims. Cox prepared for and took the deposition of Neil Gillis in his individual and corporate designee capacities. Once Round Hill finally produced the relevant documents, Cox engaged in extensive analysis of those documents, establishing that Round Hill lacked ownership. In the face of this evidence Round Hill persisted, and Cox had to oppose summary judgment on the issue, including supplemental briefing. Cox continued to incur fees preparing to attack Round Hill’s ownership of the asserted works at trial until November 19, 2016, when the Court issued its summary judgment order dismissing Round Hill’s claims. Dkt. 675.

PUBLIC VERSION - REDACTED**III. ARGUMENT****A. Cox Should Recover Attorney's Fees It Incurred Defending Against Round Hill's Copyright Claims.**

Round Hill's case against Cox was unreasonable from start to finish: it brought claims of copyright infringement without owning any copyrights, and it continued to pursue those claims aggressively even after Cox exposed the obvious defect on this threshold issue. Federal copyright law is clear: only "[t]he legal or beneficial *owner of an exclusive right* under a copyright is entitled . . . to institute an action for any infringement of that particular right committed *while he or she is the owner of it.*" 17 U.S.C. § 501(b)(emphasis added). Round Hill's repeated obfuscation of the facts, and the continued and aggressive pursuit of those claims after their falsehood was apparent, warrant an award to Cox of the fees Cox incurred defending against those claims.

1. Legal Standard

The Copyright Act permits a court, in its discretion, to "award a reasonable attorney's fee to the prevailing party. . . ." 17 U.S.C. § 505. Under § 505, a prevailing defendant is one that successfully defends against "the significant claims actually litigated in the action" or succeeds on a significant issue in the litigation. *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 152 F. Supp. 3d 503, 511 (E.D. Va. 2015)(citing *Farrar v. Hobby*, 506 U.S. 103 (1992)). A defendant that wins summary judgment in its favor against a copyright infringement claim is a prevailing party. *Cramer v. Crestar Fin. Corp.*, 67 F.3d 294, at *6 (4th Cir. 1995)(defendant was prevailing party where it "won summary judgment in its favor against the allegation that it had committed certain copyright violations"); see *Caner v. Autry*, No. 6:14-CV-00004, 2014 WL 2967607, at *4 (W.D. Va. July 1, 2014). The same standard applies to both prevailing plaintiffs and prevailing defendants: a court should award fees when the prevailing party's successful prosecution or defense of a claim furthers the purpose of the Copyright Act. See *Fogerty v.*

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Fantasy, 510 U.S. 517, 534 (1994). And “defendants should be ‘encouraged to litigate [meritorious copyright defenses] to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.’” *Kirtsaeng v. John Wiley & Sons*, 136 S. Ct. 1979, 1985 (2016) (quoting *Fogerty*, 510 U.S. at 527)).

In *Kirtsaeng v. John Wiley & Sons*, the Supreme Court provided further guidance on the application of Section 505, clarifying that district courts should “give substantial weight to the objective [un]reasonableness of the losing party’s position” while also “tak[ing] into account a range of considerations beyond the reasonableness of litigating positions.” *Id.* at 1988. Notably, the Court observed that a fee award may be appropriate to deter “overaggressive assertions of copyright claims.” *Id.* at 1989.

Courts in the Fourth Circuit have long looked to four factors when considering whether to award a prevailing party fees: “(1) ‘the motivation of the parties,’ (2) ‘the objective reasonableness of the legal and factual positions advanced;’ (3) ‘the need in particular circumstances to advance considerations of compensation and deterrence,’ and (4) ‘any other relevant factor presented.’” *Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503, 504 (4th Cir. 1994) (quoting *Rosciszewski v. Arete Assoc., Inc.*, 1 F.3d 225, 234 (4th Cir. 1993)).³ Consistently with *Kirtsaeng*, the Fourth Circuit recognizes objective reasonableness as “generally the most important factor” and gives it significant weight while taking all relevant factors into account. *Humphreys & Partners*, 152 F. Supp. at 512 (citing *Rosciszewski*, 1 F.3d at 234).

Here, Cox won complete victory on, and dismissal of, Round Hill’s claims. *Cramer*, 67 F.3d at *6-7. Each of the Fourth Circuit factors indicates that an award to Cox is appropriate here.

³ The Supreme Court endorsed these factors in *Fogerty* and again noted them in *Kirtsaeng*. See *Kirtsaeng*, 136 S. Ct. at 1985 (citing *Fogerty*, 510 U.S. at 534, n.19).

PUBLIC VERSION - REDACTED**2. Round Hill Pursued Factually and Legally Unreasonable Positions.**

In examining “the objective reasonableness of the legal and factual positions advanced,” the Court “may consider . . . whether the positions advanced by the parties were frivolous, on the one hand, or well-grounded in law and fact, on the other.” *Rosciszewski*, 1 F.3d at 234. A claim need not rise to the level of frivolousness to be objectively unreasonable. *Humphreys & Partners*, 152 F. Supp. 3d at 514 (plaintiff’s legal positions were not frivolous but nonetheless objectively unreasonable). The Supreme Court in *Kirtsaeng* ruled that courts should give significant weight to a losing party’s objective (un)reasonableness because doing so “will predictably encourage . . . useful copyright litigation” because “it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation.” *Kirtsaeng*, 136 S. Ct. at 1986.

Here, Round Hill took factually and legally unreasonable positions when it sued Cox, and aggressively litigated against Cox, *without owning the copyrights it asserted*. Round Hill had all facts and information it needed in order to know whether it owned the copyrights long before filing suit: it had all relevant agreements and should have verified its chain of title before suing Cox. The striking change in the language in Round Hill’s notices of claimed infringement in late 2013, backing away from assertions of ownership, evidenced its awareness of its ownership failings. In light of that track record, Round Hill’s copyright suit was factually unreasonable. In *Humphreys & Partners* the plaintiff “asserted infringement largely on the basis of ideas, concepts, and individual standard features, all of which the Copyright Act clearly excludes as bases for infringement.” *See* 152 F. Supp. 3d at 514. Round Hill sued Cox notwithstanding an even clearer defect: it didn’t own any copyrights at all. Then, with knowledge of that defect, Round Hill tried to bulldoze past it by seeking summary judgment on its false ownership while trying to deny Cox the right to dispute ownership.

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Round Hill's legal positions were also unreasonable. As this Court made clear in its summary judgment order, "a plaintiff with the right to take actions that are merely incidental to copyright ownership without any accompanying interest in one of § 106's rights does not have standing to bring an infringement claim." MSJ Order at 20. The agreements Round Hill relied on merely provide that Round Hill would perform administrative services related to copyrights it did not own. Dkt. 398 (Cox MSJ Opp.) at 25; MSJ Order at 23 (quoting with approval Cox's opposition to Round Hill's summary judgment motion). Round Hill's insistence that it had standing based on its "full control" over the works at issue lacked any legal meaning. And Round Hill's unreasonable legal positions did not end there. As the Court observed, "[r]ather than attempting to explain what language in the agreements conveyed an exclusive license" or any ownership interest, much of Round Hill's initial summary judgment briefing focused on "challenging Cox's ability to make its standing challenge." MSJ Order at 24. Round Hill thus resorted to arguing that it was actually *Cox* that lacked standing to dispute Round Hill's false ownership claims. The Court rejected this argument too. *Id.* at 25-26.

As in *Diamond Star*, where the plaintiff's persistence in asserting meritless claims "compelled" the defendant to litigate the case, here, faced with Round Hill's persistence in pursuing baseless claims, Cox had "no choice but to litigate." 30 F.3d at 506. This factor weighs heavily in favor of Cox recovering its fees spent dismantling Round Hill's claims.

3. The Parties' Motivations Also Favor Awarding Cox Its Fees.

The Court must also examine "the motivation of the parties" in evaluating a fee application. *Diamond Star*, 30 F.3d at 506. The Fourth Circuit does not "condition an award of attorney's fees under § 505 to a prevailing defendant on a finding that the plaintiff pursued copyright litigation in bad faith" as there is "no indication either in statutory language or legislative history that bad faith should be a prerequisite to a fee award." *Rosciszewski*, 1 F.3d at 234. Courts have found that the

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motivation of the parties favored a fee award where the losing party acted negligently in its conduct related to the dispute.

In *Quantum Sys. Integrators, Inc. v. Sprint Nextel Corp.*, this Court held that the motivation of the parties favored awarding a prevailing plaintiff fees where the litigation originated “primarily because of [defendant’s] misrepresentation” that it had not operated software after executing a settlement agreement requiring it to cease operating the software, and where “the evidence showed that this assertion was false.” No. 1:07-cv-491, 2009 WL 3423848, at *2-3 (E.D. Va. Oct. 16, 2009) (O’Grady, J.). The Court concluded that was negligent and supported an award of attorney’s fees to the plaintiff. *Id.*

Here, Round Hill exhibited similar negligence and in addition deliberate evasiveness throughout the litigation. As Cox explained above, Round Hill did not own any copyrights, but sued Cox anyway. Round Hill equivocated about the works at issue throughout the lawsuit. It delayed production of documents relating to ownership to and misrepresented its copyright ownership during discovery, [REDACTED]

[REDACTED] Bridges Dec. Exs. N, O. This factor therefore also supports a fee award to Cox.

4. Awarding Cox Its Fees Against Round Hill Will Appropriately Compensate Cox and Deter Future Frivolous Copyright Claims Without Copyright Ownership.

The Fourth Circuit has recognized that a fee award to a prevailing defendant can further “the goal of deterring a party from pursuing frivolous litigation.” *Diamond Star*, 30 F.3d at 506. Courts in this circuit have also observed that “the need for a fee award is greater for prevailing defendants than it is for prevailing plaintiffs, as prevailing defendants obtain no affirmative relief from a victory on the merits.” *Humphreys & Partners*, 152 F. Supp. 3d at 516. Without recovering fees, “a defendant’s costs of vindicating its rights would often, if not always, exceed the

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private benefit to the defendant, and thus defendants would be more inclined to settle.” *Id.* Here, an award of fees to Cox would deter prospective copyright plaintiffs from bringing suit without owning any copyrights and would encourage defendants to defend against plaintiffs who lack copyrights.

While at a broader level the litigation by BMG addressed novel and complicated issues, the flaws in Round Hill’s claims were simple, and its claims were plainly baseless from the outset. Because the relevant factors support awarding Cox its fees against Round Hill, the Court should grant Cox’s motion.

B. The Fees Cox Requests Are Reasonable.

Courts use the “lodestar” methodology to calculate a prevailing party’s fee award. *Humphreys & Partners*, 152 F. Supp. 3d at 516, *appeal dismissed* (July 18, 2016). The Fourth Circuit has prescribed a three-step procedure. *Id.*; *accord Grissom v. The Mills Corp.*, 549 F.3d 313, 320-21 (4th Cir. 2008). “[A] district court must first determine the lodestar amount (reasonable hourly rate multiplied by hours reasonably expended),” applying the twelve factors set forth in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714 (5th Cir. 1974), *abrogated in part on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989). *Grissom*, 549 F.3d at 320; *see also Hensley v. Eckerhart*, 461 U.S. 424, 429, 434 & n.9 (1983) (approving the *Johnson* factors). The *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the desirability or undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson*, 488 F.2d

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at 717-19. The Court need not address each of the twelve *Johnson* factors independently, as “many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.” *Hensley*, 461 U.S. at 434; accord *Seoul Broad. Sys. Int'l, Inc. v. Young Min Ro*, No. 1:09CV433 LMB/IDD, 2011 WL 4478566, at *5 (E.D. Va. Sept. 26, 2011). Cox discusses these factors, as necessary, in the sections that follow.

Once a court has calculated the lodestar, “the ‘court then should subtract fees for hours spent on unsuccessful claims unrelated to successful ones.’” *Grissom*, 549 F.3d at 321 (quoting *Johnson v. City of Aiken*, 278 F.3d 333, 337 (4th Cir. 2002)). Finally, the district court “awards some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff.” *Grissom*, 549 F.3d at 321 (quoting *Johnson*, 278 F.3d at 337).

Cox requests only those fees that it reasonably incurred to litigate the issue of Plaintiff Round Hill’s copyright ownership. The evidence at summary judgment demonstrated that Round Hill held no exclusive rights in any of the works at issue. Normally, such “excellent results” would allow a prevailing party to obtain a “fully compensatory fee.” See *Hensley*, 461 U.S. at 435. Rather than seeking reimbursement at the full rates of its defense counsel, however, Cox reduces its request to reflect rates that courts in this district have approved in comparable cases such as *Humphreys & Partners*. Moreover, Cox narrowly tailors its fee request to reflect only work relating to Round Hill specifically, and it excludes from the request time spent on tasks unrelated to Round Hill. Overall, Cox seeks an award of **\$71,835.00**, which reflects **319.90** hours of work by Cox’s attorneys and staff before the judgment. Bridges Dec. at ¶ 39, Ex. P. Cox also requests a further estimated amount of \$35,000 for work in this motion and reply, subject to detailed documentation later.

PUBLIC VERSION - REDACTED**1. Cox Secured a Complete Victory Against Round Hill.**

The “most critical factor” in a fee award calculation is the “degree of success” a party obtains. *Hensley*, 461 U.S. at 436. For instance, if a prevailing party achieves “only partial or limited success,” the typical lodestar calculation, i.e. reasonable hours times a reasonable hourly rate, “may be an excessive amount.” *Id.*; see also *Quantum Sys. Integrators*, 2009 WL 3423848 at *6, *8 (reducing lodestar amount by 40% where plaintiff’s success was “minimal”). In contrast, where the prevailing party “has obtained excellent results,” awarding the full lodestar value is appropriate. *Hensley*, 461 U.S. at 435.

Cox prevailed completely over Round Hill. The Court’s ruling on Round Hill’s ownership disposed of all of its claims against Cox: the Court found that “Round Hill Music LP cannot proceed in this action and its claims for infringement against Cox are dismissed.” MSJ Order at 26. As Cox described above, Round Hill knew about the problems with its ownership all along, likely before it sued Cox. Bridges Dec. at ¶¶ 2-3, 13; Exs. A, B, M at 46:13-47:15; 48:3-51:18; 176:7-179:13. Cox vigorously defended and secured a complete victory on the dispositive issue of Plaintiff Round Hill’s ownership. It is therefore now appropriate to award Cox the full lodestar amount for work specifically on Round Hill’s claims.

2. Cox Requests Reasonable Rates for the Work Its Counsel Performed on Round Hill’s Claims.

A rate is reasonable if it is “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); accord *CACI, Int’l, Inc. v. Pentagon Techs. Int’l, Ltd.*, No. CIV.A. CV-93-1631-A, 2002 WL 32843931, at *1 (E.D. Va. Aug. 29, 2002) (quoting *Blum*). Defending this lawsuit required counsel with experience in many different copyright law issues, and Cox’s counsel has extensive experience in litigating copyright and other intellectual property matters for

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Internet services and technology companies. *See* Bridges Dec. at ¶ 25; Ex. Q (Cox’s lead counsel, Andrew Bridges, has roughly three decades of experience in litigating and counseling on intellectual property matters). Federal courts in several judicial districts have recently awarded fee awards to Fenwick clients in intellectual property lawsuits based on the actual fee that Fenwick attorneys charge, including fees for the work of several lawyers who represented Cox in this lawsuit. *See, e.g., Perfect 10, Inc. v. Giganews, Inc.*, No. 11-07098-AB SHX, 2015 WL 1746484, at *15-17, 29-30 (C.D. Cal. Mar. 24, 2015) (finding Fenwick attorneys’ rates, including Andrew Bridges, Brian Buckley, and Armen Nercessian, were consistent with prevailing market rates, and awarding \$5.2 million dollars in attorneys’ fees, after applying a 10% reduction); *IPVX Patent Holdings, Inc. v. VoxelNet LLC*, No. 5:13-cv-01708, 2014 WL 5795545, at *7-8 (N.D. Cal. Nov. 6, 2014) (awarding full fees and noting the reasonableness of Fenwick rates).

The “rocket-docket” pace of this matter, which raced from the complaint to trial in little over a year, also supports the reasonableness of Fenwick’s rates. “Priority work that delays the lawyer’s other legal work is entitled to some premium,” and Round Hill’s ownership issue distracted from the more complex and novel issues that this case presented. *See Johnson*, 488 F.2d at 718. Furthermore, given the size and pace of the case, the principal Fenwick attorneys had limited ability to perform substantial work on other matters, which provides further support for the reasonableness of its fees. Bridges Dec. at ¶ 24; *see also Johnson*, 88 F.2d at 718 (considering “[t]he preclusion of other employment by the attorney due to acceptance of the case” in evaluating a fee award)(emphasis omitted).

While Fenwick’s actual rates are reasonable, Cox does not seek reimbursement of its fees at those rates because the rate of an attorney’s fees award must be based on the “relevant community where the district court sits,” here the Eastern District of Virginia. *See Grissom*, 549 F.3d at 321. Just recently, in the copyright case *Humphreys & Partners*, the district court

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surveyed cases in the Eastern District of Virginia to determine what rates courts in this judicial district have deemed reasonable and found that, “[i]n cases similar in nature, difficulty, and complexity to the present case, courts in this district have recognized rates up to \$420/hour for partners, \$275/hour for associates, and \$120/hour for litigation support staff.” *Humphreys & Partners*, 152 F. Supp. 3d at 519 & n.25 (collecting cases).

Consistent with *Humphreys & Partners*, Cox has reduced the rates at which it seeks reimbursement as follows: \$420/hour for partners; \$275/hour for associates with two or more years of experience; \$170/hour for associates with less than two years of experience; and \$120/hour for litigation support staff. Bridges Dec. at ¶ 38. The table below reflects the actual and adjusted rates of time keepers with billing entries for which Cox seeks reimbursement:

Time Keeper	Status	Actual Billing Rate (2015)	<i>Humphreys</i> Billing Rate
Bridges, Andrew	Partner	\$970	\$420
Hayes, David L.	Partner	\$970	\$420
Buckley, Brian	Partner	\$780	\$420
Jobson, Guinevere	Associate	\$665	\$275
Nercessian, Armen	Associate	\$530	\$275
Solomon, Ronnie	Associate	\$530	\$275
Plassaras, Nicholas	Associate	\$385	\$170
Corwin, Tonia E.	Paralegal	\$360	\$120
Chan, Matthew	Paralegal	\$140	\$120
Wilson, Adrienne	Paralegal	\$140	\$120

Id. As Cox’s requested fees are reasonable adjustments to rates in line with norms in this district, the Court should award Cox’s request for fees at these adjusted rates.

3. Cox Has Narrowly Tailored Its Request and Seeks Reimbursement Only for Hours Reasonably Necessary to Litigate Round Hill’s Ownership and This Motion.

A prevailing party that obtains less than all the relief it requested may nevertheless “recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure

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of attorney time.” *Hensley*, 461 U.S. at 435 n.11. While not required “to record in great detail how each minute of his time was expended,” counsel for the prevailing party “should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.” *Id.* at 437 & n.12. “Entries that do not disclose the nature, volume, or relevance of the documents frustrate any attempt to assess the reasonableness of the time devoted to that task.” *Route Triple Seven Ltd. P’ship v. Total Hockey, Inc.*, 127 F. Supp. 3d 607, 621 (E.D. Va. 2015).

In preparing the billing entries for this fee request, Fenwick adopted a conservative approach and reduced or struck time entries that could arguably appear vague or duplicative. Bridges Dec. at ¶ 18. Fenwick also omits entries for tasks that involved work that Cox would have had to perform apart from Round Hill’s claims, such as projects or motions relating to Rightscorp, the agent for both BMG and Plaintiff Round Hill. Bridges Dec. at ¶ *Id.* Fenwick’s excerpted billing statements contain two kinds of billing entries: (1) entries for which Cox seeks ***complete reimbursement***, where the entry exclusively involves work about Round Hill and its alleged ownership of the works at issue (e.g., tasks related to the depositions of Mr. Gillis or the supplemental briefing on Round Hill’s ownership); and (2) entries for which Cox seeks ***partial reimbursement***, where some portion of the entry involves Round Hill-related work.⁴ Bridges Dec. at ¶ 19. To aid this Court’s review of the invoices, Fenwick provides relevant excerpts of Cox’s billing statements that reflect only entries within the scope of this request, and Fenwick has annotated the billing statements by:

- blacking out entries that have no relation to Round Hill specifically;

⁴ For those entries where Cox seeks ***partial reimbursement***, Fenwick has apportioned the overall hours for the entry to reflect the portion of the billing entry that relates to Round Hill. For instance, where a task within a billing entry relates to both Plaintiffs, Fenwick applies a 50% apportionment. Similarly, where a task relates to Rightscorp and both Plaintiffs, Fenwick applies a 25% apportionment; this approach assumes that the portion of the task relating to Rightscorp takes roughly 50% of the time, and the portion relating to Plaintiffs takes the other 50%. Bridges Dec. at ¶ 19, Ex. P. The billing statements contain a brief explanation for each individual apportionment.

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- striking out portions of time entries that have no relation to Round Hill specifically; and
- providing revised time figures for the relevant portions of time entries, while leaving intact the time entries that pertain exclusively to Round Hill.

Bridges Dec. at ¶ 20, Ex. P.⁵

Cox seeks reimbursement for a total of **319.90** hours that its counsel and paralegal staff spent specifically litigating Round Hill's claim of ownership. Bridges Dec. at ¶ 39, Ex. P. The following table reflects the hours recorded by each Fenwick time keeper who performed work in the connection with Round Hill's ownership claim:

Time Keeper	Role	Hours	Billed Total	Actual Billing Rate	Adjusted Billing Rate
Bridges, Andrew	Partner	35.35	\$14,847.00	\$970	\$420
Hayes, David L.	Partner	7.38	\$3,099.60	\$970	\$420
Buckley, Brian	Partner	9.67	\$4,061.40	\$780	\$420
Jobson, Guinevere	Associate	3.40	\$935.00	\$665	\$275
Nercessian, Armen	Associate	10.25	\$2,818.75	\$530	\$275
Solomon, Ronnie	Associate	56.75	\$15,606.25	\$530	\$275
Plassaras, Nicholas	Associate	136.30	\$23,171.00	\$385	\$170
Corwin, Tonia E.	Paralegal	44.10	\$5,292.00	\$360	\$120
Chan, Matthew	Paralegal	4.70	\$564.00	\$140	\$120
Wilson, Adrienne	Paralegal	12.00	\$1,440.00	\$140	\$120
Totals		319.90	\$71,835.00		

These hours reflect work on the following discrete projects:

- affirmative written discovery to Round Hill;
- matching Round Hill agreements to works at issue;

⁵ In one instance, Cox also redacts a small portion of an entry to protect work product and privileged material appearing within a portion of a relevant billing entry, but this instance should be readily apparent.

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- review of Round Hill production for compliance with Cox's requests for production;
- preparing and arguing Cox's motion to compel further production from Round Hill;
- preparing for and taking the depositions of Neil Gillis and Round Hill;
- preparing and arguing Cox's motion for evidentiary sanctions based on Plaintiffs' failure to produce evidence of ownership;
- preparing the ownership section of Cox's affirmative motion for summary judgment (not filed);⁶ and
- preparing and filing portions of opposition to Plaintiffs' motion for partial summary judgment relating to Round Hill's ownership, including preparing of supplemental briefing on Round Hill's ownership.

Bridges Dec. at ¶ 22, Ex. P. Cox's fee request reflects all courtesy discounts from Fenwick. Cox does not seek reimbursement of fees that Counsel on Call, Cox's document review vendor, incurred in reviewing Round Hill's document productions. Bridges Dec. at ¶ 21.

In addition, Cox seeks an additional estimated amount of \$35,000 for fees it expects to incur for this motion and the reply. Federal cases considering statutory fee provisions, like Section 505 of the Copyright Act, generally authorize compensation for time spent litigating fee awards. *See, e.g., Daly v. Hill*, 790 F.2d 1071, 1080 (4th Cir.1986); *Trimper v. City of Norfolk*, 58 F.3d 68, 77 (4th Cir. 1995) (time spent defending entitlement to attorney's fees is properly compensable under § 1988).

⁶ Cox initially intended to include argument disputing Plaintiffs' ownership claims in its own motion for summary judgment, and it asked Plaintiffs' counsel if it would agree to an extension of the page limit on summary judgment brief. Bridges Dec. at ¶ 16. Plaintiffs' counsel denied the request and thus Cox decided to forgo argument about ownership in its opening summary judgment brief. *Id.* Cox later used that work in connection with its opposition to Plaintiffs' motion for partial summary judgment. *Id.*

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Cox devoted a reasonable amount of time to litigating the issue of ownership and its invoices reflect a reasonable division of labor: Nicholas Plassaras, a first-year associate at the time, served as the laboring oar on the question of Round Hill's ownership. Bridges Dec. at ¶¶ 33, 39. His work on this issue accounts for over forty percent of the time for which Cox seeks fees. Bridges Dec. at ¶ 39. Apart from the depositions of Mr. Gillis, senior attorneys on the team served largely a supervisory role. Bridges Dec. at ¶ 24. That too was appropriate. After all, the ownership issues, while requiring a substantial amount of time and close attention to the agreements in Round Hill's document production, did not present novel legal issues. *See* Bridges Dec. at ¶¶ 22, 39.

Because Cox has narrowly tailored its request to reflect work that was necessary to prevail against Round Hill, and Cox's attorneys devoted a reasonable number of hours to investigating and litigating the issue of Round Hill's ownership, this Court should award the full amount of fees that Cox seeks.

IV. CONCLUSION

For the reasons Cox has explained above, Cox respectfully requests that this Court grant its motion for attorneys' fees and costs.

Dated: September 30, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2016, the foregoing redacted document was filed and served electronically by the Court's CM/ECF system upon all registered users. Additionally, the undersigned hereby certifies that pursuant to Fed. R. Civ. P. 5(d) and Local Rule 5, all counsel of record for Plaintiffs were served by electronic mail on September 30, 2016 with a true and correct copy of the unredacted COX'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR ATTORNEYS' FEES.

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