LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV-12-10077-BRO**	Date	October 25, 2013
Title	**DuckHole Inc. v. NBCUniversal Media LLC et al**		

Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS)

ORDER RE Motion for Attorneys' Fees and Costs under 17 U.S.C. § 505 [30]

I. Introduction and Background

Before the Court is a Motion for Attorneys' Fees and Costs pursuant to 17 U.S.C. § 505 filed by Defendants NBC Universal Media, LLC, Open 4 Business Productions, LLC and American Work, Inc.'s (collectively "Defendants"). (Dkt. No. 30.) After consideration of the papers filed in support of and in opposition to the instant motion, the Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15.

On November 26, 2012, Plaintiff DuckHole, Inc. filed a Complaint alleging Defendants committed copyright infringement of its treatment, *PETS*. (Dkt. No. 6.) Plaintiff sought compensatory, statutory, and exemplary damages, as well as equitable relief for Defendants' "willful" infringement of Plaintiff's copyrighted work. (Dkt. No. 6 ¶¶ 20-21.) Defendants' work, *Animal Practice*, depicts day-to-day life at Crane Animal Hospital, a fictional "privately-owned upscale animal hospital in New York City." (Dkt. No. 12 at 5.) While the television show feature exotic animals, its plot lines largely focus on the personal lives of its ensemble cast of characters. (Dkt. No. 12 at 5-6.) By contrast, the treatment for *PETS* depicts a city-owned after hours veterinary clinic. (Dkt. No. 13-1 at 4; Dkt. No. 6 ¶ 11.) Additionally, *PETS* includes a second plot theme featuring a lawyer who sues the tortfeasors responsible for injuring the clinic's patients. (Dkt. No. 13-1 at 4; Dkt. No. 6 ¶ 11.)

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Defendants filed a motion to dismiss Plaintiff's First Amended Complaint ("FAC") on April 17, 2013, arguing the *PETS* treatment was not "substantially similar" to *Animal Practice*. (Dkt. No 12.) On September 6, 2013, the Court granted Defendants' motion to dismiss. (Dkt. No. 27.) The FAC was dismissed with prejudice because "no amendment could cure its deficiencies." (Dkt. No. 27 at 13.) The Court found that "*PETS* and *Animal Practice* have distinct plots, demonstrating that they are wholly different expressions of the same idea." (Dkt. No. 27 at 10.) Additionally, the elements identified by Plaintiff demonstrating similarity "are too generic to be protectable elements." (Dkt. No. 27 at 11.) Based on these findings, the Court ruled that "[e]ach factor in the 'extrinsic test' militate[d] so strongly in Defendants' favor that no reasonable jury could conclude that the treatment of *PETS* and *Animal Practice* are substantially similar." (Dkt. No. 27 at 13.)

Defendants move the Court to award them $65,781 in attorneys' fees and $878.11 in costs. The Court **GRANTS** this motion, and explains its reasoning in greater detail below.

II. Legal Standard

The Copyright Act of 1976 permits a court to "award a reasonable attorneys' fee to the prevailing party." 17 U.S.C. § 505; *see also Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 614 (9th Cir. 2010) (citing 17 U.S.C. § 505). Attorneys' fees are proper when either successful prosecution or successful defense of the action furthers the purposes of the Copyright Act. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 558 (9th Cir.1996). In determining whether a party is entitled to attorneys' fees, courts must apply the same standard to prevailing plaintiffs and defendants. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

"[A]n award of attorneys' fees to a prevailing defendant that furthers the underlying purposes of the Copyright Act is reposed in the sound discretion of the district courts." *Fantasy*, 94 F.3d at 555. In determining whether to award a prevailing defendant attorneys' fees the court should consider the following factors (1) defendant's degree of success obtained on the claim, (2) the frivolousness of plaintiff's claim, (3) the objective reasonableness of plaintiff's factual and legal arguments, (4) plaintiff's motivation in bringing the lawsuit, and (5) the need for compensation and deterrence. *Id*. at 558. This does not represent an exhaustive list and all factors need not be met. *Id*. at 559.

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III. The *Fogerty* Test

A. Degree of Success

Under the first factor, the Court weighs the party's degree of success in a lawsuit. *See Fantasy,* 94 F.3d at 559. This factor weighs more in favor of a party who prevailed on the merits, rather than on a technical defense. *See id.* Here, Defendants prevailed on the merits. The Court granted Defendants motion to dismiss without leave to amend after finding "no similarity, much less substantial similarity, between any expressive elements in the works." (Dkt. No. 27 at 10.) This factor weighs in favor of granting Defendants' Motion.

B. Frivolousness

Under the second factor, the Court examines whether the underlying lawsuit was frivolous. *Fantasy*, 94 F.3d at 569. Plaintiff argues this factor weighs in its favor. Defendants, however, do not argue Plaintiff's claim was frivolous. (Dkt. No. 30 at 5 n. 2.) Instead they cite to Ninth Circuit precedent holding that "a finding of bad faith, frivolous or vexatious conduct is no longer required." *Id*. at 560 (citing *Fogerty II,* 510 U.S. at 532–533 n. 18). Because a finding of frivolity is not essential to award attorneys' fees, the Court will not discuss this factor further.

C. Objective Reasonableness of Plaintiff's factual and legal arguments

Under the third factor, a court must consider the objective reasonableness of a party's claims, "both in the factual and in the legal components of the case." *Perfect 10, Inc. v. CCBill LLC,* 488 F.3d 1102, 1120 (9th Cir. 2007) (citing *Fogerty II*, 510 U.S. at 534 n. 19). After weighing the factual and legal arguments, the Court finds Plaintiff was unreasonable in pursuing its claim.

To successfully establish a copyright infringement claim, a plaintiff has to demonstrate (1) plaintiff's ownership of the copyright, (2) the defendant's access to plaintiff's work, and (3) substantial similarity between plaintiff's work and the allegedly infringing material. *Berkic v. Crichton,* 761 F.2d 1289, 1291-92 (9th Cir.1985). Plaintiff had a valid copyright registration for the treatment. Plaintiff did not allege sufficient facts

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to demonstrate access. The Court found however that discovery to determine access was unnecessary because the works were not substantially similar. (Dkt. No. 27 at 8.)

Plaintiff argued the idea of a show about an animal hospital was novel, and Defendants version was substantially similar. The Court found, however, that "a show about an animal hospital is itself too generic to be protectable." (Dkt. No. 27 at 9.) Under controlling Ninth Circuit precedent, ideas are not protectable. *Funky Films v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). Only expressions that include "specific details of an author's rendering of ideas," are protectable. *Id*. (internal quotation marks omitted). Plaintiff also argued the shows' protectable elements were substantially similar, drawing references to shared settings and comparable themes.[1] (Dkt. No. 16 at 2-15.) In keeping with the *Funky Films* decision, the Court found "that the elements alleged by Plaintiff are too generic to be protectable and are *scenes a faire* flowing from an animal hospital." (Dkt. No. 27 at 9.) As Defendants argue, the Ninth Circuit has clearly instructed that "[i]n applying the extrinsic test, the Court compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters." *Id*. at 1077 (holding that a screenplay and television series which had similar themes including the family-run funeral home, the father's death, and the return of the "prodigal son" were not substantially similar).

The Court finds Plaintiff was unreasonable in arguing that the protectable elements were substantially similar and that the idea of a sitcom set in an animal hospital was novel enough to support a copyright infringement claim. This factor therefore weighs in favor of Defendants.

[1] Plaintiff pointed to the shows' scenes which were similarly staged inside an animal hospital, examining room, and lobby. (Dkt. No. 18 at 14.) Plaintiff drew similarities in episode themes and characters, pointing to the romantic chemistry between the two lead characters and the presence of a resident pet. (Dkt. No. 18 at 8.)

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D. Motivation

Under the fourth factor, the Court determines whether the party demonstrated a bad faith motivation in litigating the case. *See Fantasy*, 94 F.3d at 558. As discussed above, a finding of bad faith is not necessary to grant Defendants Motion. *See id*. (Requiring bad faith is "'too narrow a view of the purposes of the Copyright Act because it fails to adequately consider the important role played by copyright defendants.'")

Plaintiff contends it is a small eight-year old production company that "has primarily been involved in the music recording, production and promoting business." (Dkt. No. 32 at 15.) Plaintiff argues that this is "the first lawsuit [it] has ever filed" and there is not "a pattern of pursuing frivolous lawsuits." (Dkt. No. 32 at 15.) While it may be Plaintiff's first lawsuit, it is certainly not the first lawsuit for Plaintiff's principle. Plaintiff's counsel of record, Paul J. Andre ("Mr. Andre") is also Plaintiff's CEO and Director.[2] (Dkt. No. 35-1 at 4.) Mr. Andre is a partner in the Intellectual Property Department of Kramer Levin Naftalis & Frankel LLP.[3] (Dkt. No. 33 ¶ 2.)

Plaintiff argues it took the situation very seriously and "even attempted to work out its concerns with Defendants before filing a lawsuit and responded to Defendants reasonably throughout this entire process." (Dkt. No. 32 at 15.) Plaintiff, however, never responded in writing to Defendants numerous letters and emails that attempted to dissuade him from suit. On February 20, 2013, counsel for Defendants, Joel R. Weiner ("Mr. Weiner"), sent Plaintiff's counsel a detailed nine-page meet and confer letter setting forth the controlling law and a substantial similarity analysis demonstrating that

[2] Pursuant to Federal Rule of Evidence 201(c)(1) the Court takes judicial notice of the Statutory Agent Information from the Arizona Corporation Commission. (Dkt. No. 35-1, Ex. B.) According to the Statutory Agent Information, Mr. Andre is the Chief Executive Officer and Director of Plaintiff. (Dkt. No. 35-1, Ex. B.) Mr. Andre created *PETS* in 2010 and registered the treatment with the Writers Guild of America ("WGA") on December 12, 2010. (Dkt. No. 6 ¶ 10.) Following WGA registration, Andre assigned all rights in *PETS* to Plaintiff. (Dkt. No. 6 ¶ 10.)

[3] The Court takes judicial notice pursuant to Federal Rule of Evidence 201(c)(1) of Mr. Andre's attorney profile from WestlawNext™. *See* Andre, Paul J., Attorney and Judge Profiles.

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Plaintiff's copyright claim clearly lacked merit as a matter of law. (Weiner Decl. ¶ 4, Ex. 2.) This letter also discussed the relevant case law providing that a prevailing defendant on a copyright claim is entitled to recover attorneys' fees and costs. (Weiner Decl. ¶ 4, Ex. 2 at 19-20.) Mr. Weiner sent a follow-up email on March 1, 2013, and provided Plaintiff with the recent Ninth Circuit decision in *Wild v. NBC Universal*, 513 F. App'x 640, 641 (9th Cir. 2013). (Weiner Decl. ¶ 5, Ex. 3 at 25-28.) He sent a second follow-up email on March 8, 2013, and a formal letter on March 19, 2013 informing Plaintiff it had not responded to the substance of the February 20, 2013 letter. (Weiner Decl., ¶¶ 6-7.) In a final effort to dissuade Plaintiff from pursing a meritless claim, Mr. Wiener emailed Plaintiff's counsel a copy of Defendants' reply in support of its motion to dismiss on July 3, 2013. (Weiner Decl. ¶ 10, Ex. 10.) Mr. Weiner offered to waive fees and costs if Plaintiff agreed to reconsider dismissal in advance of the motion to dismiss hearing. (Weiner Decl. ¶ 10, Ex. 10.) Plaintiff's counsel refused.

Despite Plaintiff's lack of written response, there is not sufficient evidence to show it exhibited bad faith conduct during the litigation. As such, the Court finds the motivation factor is a neutral for both parties. While motive may not be clear, it is apparent that Plaintiff should have understood the potential consequences of pursuing a meritless claim for copyright infringement.[4]

E. Need for Compensation and Deterrence

Under the fifth factor, the Court determines whether an award for defendants would "advance considerations of compensation and deterrence." *Wild v. NBC Universal, Inc.*, No. CV 10-3615 at *4 (C.D. Cal. July 18, 2011) (order granting motion for attorneys' fees) (quoting *Fantasy*, 94 F.3d at 558 n. 2). According to Plaintiff, the public policy considerations weigh in its favor. It argues "an award of attorney[s'] fees would be a death sentence to such a small company and be trivial to Defendants." (Dkt. No. 32 at 17-18.) Plaintiff is overlooking the fact that *Animal Practice* was created by two small production companies Open 4 Business Productions LLC, and American Work. (Dkt. No. 35 at 5; Dkt. No. 31, Ex. 1.) They are also Defendants in this case. (Dkt. No. 35 at 5; Dkt. No. 31, Ex. 1.) While NBCUniversal Media, LLC may be capable of shouldering

[4] Plaintiff also requested attorneys' fees and costs in its FAC. (Dkt. No. 6 ¶ 22.)

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litigation costs, the other Defendants are not. (Dkt. No. 35 at 5.) Plaintiff argues that requiring him to pay attorneys' fees will have a stifling effect on small companies and artists, who will be unable to enforce their copyrights for fear of high litigation costs. Requiring Open 4 Business Productions, LLC and American Work, Inc.'s to pay attorney fees could similarly have a stifling effect on the creation of works. (Dkt. No. 35 at 5.)

The Court has determined that Plaintiff's lawsuit was objectively unreasonable, that Plaintiff was a sophisticated party, and that Defendants made an extra effort to educate Plaintiff of the governing case law. In *Scott v. Meyer*, the Court was persuaded to award attorneys' fees after "[d]efendants were forced to defend against plaintiff's claims even after pointing out the fatal flaws from which her lawsuit suffered." No. CV 09-6076 ODW(RZX), 2010 WL 2569286 at *3 (C.D. Cal. June 21, 2010). The Court is similarly persuaded to award Defendants attorneys' fees and costs. "Deterring non-meritorious lawsuits against defendants seen as having 'deep pockets' and compensating parties that must defend themselves against meritless claims are both laudable ends." *Id.*

IV. Attorneys' Fees

An award of attorneys' fees must be reasonable. 17 U.S.C. § 505. The reasonableness of a party's fee calculation is determined by the "lodestar method." *Morales v. San Rafael*, 96 F.3d 359, 363 (9th Cir.1996). "The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

The Court may then consider whether to enhance or reduce the lodestar figure based on twelve factors: (1) the time and labor involved; (2) the novelty and difficulty of the questions involved; (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 circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Gilbert v. New Line Prods., Inc.*, CV 09-02231-RGK RZ40, 2010 WL

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5790688 (C.D. Cal. Dec. 6, 2010) *aff'd in part, vacated in part, remanded*, 490 F. App'x 34 (9th Cir. 2012).

The Court finds Defendants reasonably calculated the attorneys' fees award. In total, Defendants are requesting compensation for 151.5 hours of work. (Weiner Decl. ¶ 26.) This number does not encapsulate all of the hours Defense counsel spent preparing the case. In order to ensure the billing rates were fair and reasonable, Mr. Weiner eliminated some of the time spent by himself and his associate.[5] (Weiner Decl. ¶ 24.) Additionally, Defendants do not seek fees for time spent bringing the fee Motion, or for time expended by Gayle Title, Rebecca Ganz, or NBCUniversal's in-house counsel.[6] (Wiener Decl. ¶¶ 24, 27.) Further, Defense Counsel varied the billing rates based upon the experience and skill of the attorney performing the work. Mr. Weiner billed himself for 77.6 hours at $580 an hour. His third year associate, Mr. Christopher Carter ("Mr. Carter") was billed at $380 for 73.9 hours. (Weiner Decl. ¶¶ 25-26.) Mr. Weiner then reduced the lodestar by ten percent, to arrive at the final figure of $65,781.00. (Weiner Decl. ¶ 26.)

The Court finds that the hourly rates charged by Mr. Weiner and Mr. Carter fall within the range of rates charged by similarly situated attorneys in the Los Angeles area. *See e.g.*, *Goldberg v. Cameron*, No. C-05-03534 RMW, 2011 WL 3515899, *7 (N.D. Cal. Aug. 11, 2011) (finding the hourly rates charged by a partner at Greenberg Glusker in Los Angeles for $550 an hour to be reasonable in 2009 for a copyright infringement case). Additionally, the total amount of attorneys' fees fall within the range approved in copyright cases dismissed at a similar posture. *See e.g.*, *Wild v. NBC Universal, Inc.*, No. CV 10-3615 at *6 (C.D. Cal. July 18, 2011) (awarding Defendants $112,590.80 in attorneys' fees after dismissing the copyright infringement case because the works lacked

[5] The Court has reviewed the final billing records submitted by Mr. Wiener. Prior to submitting records to the Court, Mr.Weiner declares that he reviewed the pre-bills every month to ensure they were accurate. (Weiner Decl. ¶ 31.) In addition, to avoid any further disputes, he eliminated additional charges from the final billing records that could have been construed as redundant. In total, the Court calculated 16.8 hours that were deducted from the time recorded in the final billing records by Mr. Weiner and Mr. Carter. (Weiner ¶ 31, Ex. 11.)

[6] In total, Ms. Gayle Title and Ms. Rebecca Ganz spent 24.6 hours on the case, which were not included in the final figure of 151.5. (Weiner Decl. ¶ 24.)

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in substantial similarity); *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 890 (9th Cir. 1996) (affirming district court's award of $162,175.04 after granting summary judgment).

V. Costs

"Section 505 allows the Court in its discretion to award 'full costs.'" *Gilbert*, 2010 WL 5790688 at *6 (quoting 17 U.S.C. § 505). Reasonable costs and expenses are those that "would normally be charged to a fee paying client." *Trustees of Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006). Defendants request $878.11 in non-taxable costs. This sum covers the costs charged to Defendants for necessary photocopies, Westlaw legal research, copies of DVDs of *Animal Practice*, and local couriers to the Court and Plaintiff's counsel. (Weiner Decl. ¶ 28; Dkt. No. 30 at 10.) After reviewing the billing invoices for these costs, the Court finds the charges to be reasonable, except for the $588.60 spent making copies of *Animal Practice*. Counsel has provided no good reason why these DVDs could not have been obtained from their client at no cost, the Court finds these charges to be unwarranted. Accordingly, the Court awards the requested $878.11 in costs.

VI. Conclusion

For the foregoing reasons, the Court awards Defendants a total of $65,781.00 in attorneys' fees and non-taxable expenses in the amount of $289.51, for a total award of $66,070.51.

IT IS SO ORDERED.

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