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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **WESTERN DIVISION**

12 MICHAEL SKIDMORE, *etc.*,) Case No. 2:15-cv-03462 RGK (AGRx)
13 Plaintiff,)
14 vs.) DEFENDANT WARNER/
LED ZEPPELIN, *et al.*,) CHAPPELL MUSIC, INC.'S
15 Defendants.) MEMORANDUM OF POINTS AND
16) AUTHORITIES IN SUPPORT OF
17) MOTION FOR AWARD OF
ATTORNEYS' FEES
Date: August 8, 2016
Time: 9:00 a.m.

Courtroom of the Honorable
R. Gary Klausner
United States District Judge

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. SUMMARY OF ARGUMENT**

3 Defendant Warner/Chappell Music, Inc. (“Warner/Chappell”) respectfully
4 submits this Memorandum in support of its Motion for the \$613,471 in attorneys’
5 fees it incurred in the successful defense of plaintiff’s copyright infringement claims
6 and “right of attribution” claim, on behalf of all defendants.

7 Plaintiff filed this action on May 31, 2014 in the District Court for the Eastern
8 District of Pennsylvania, asserting nearly half-century-old claims that neither Randy
9 Wolfe nor the owner of the allegedly-infringed copyright ever bothered to assert
10 because any similarity between *Taurus* and *Stairway to Heaven* results from the use
11 of a centuries-old, public domain descending chromatic line. Defendants prevailed
12 at trial, and the award of the attorneys’ fees Warner/Chappell incurred is appropriate.

13 Attorneys’ fees are properly awarded in order to encourage and reward the
14 litigation of a meritorious defense, in this case ensuring the continued availability of
15 *Stairway to Heaven* – which plaintiff asked the Court to order enjoined and to have
16 all recordings and sheet music destroyed – and defendants thereby furthered the
17 Copyright Act’s ultimate purpose. *See, below* at 2-5. In addition, attorneys’ fees are
18 properly awarded because of plaintiff’s litigation misconduct at every step of this
19 case, from its inception through and including jury deliberations. *See, below* at 5-12.
20 Also, attorneys’ fees are properly awarded because, *e.g.*, defendants achieved
21 complete success in defending plaintiff’s objectively unreasonable positions. *See,*
22 *below* at 12-16. And, no apportionment of attorneys’ fees between plaintiff’s
23 copyright and “right of attribution” claims is required because the claims arise from
24 a common core of facts and legal theory. *See, below* at 16-17. Finally, the amount
25 of fees sought is reasonable. Indeed, although the individual defendants also
26 incurred substantial attorneys’ fees for representation by their New York counsel,
27 the individuals do not seek the award of those fees. *See, below* at 17-20.

28 Warner/Chappell respectfully submits that its Motion should be granted.

1 **2. WARNER/CHAPPELL SHOULD BE AWARDED ATTORNEYS' FEES**
2 **(a) The Court's Broad Discretion to Award Attorneys' Fees in Order**
3 **to Further the Copyright Act's Goal of Encouraging a Defendant's**
4 **Litigation of a Meritorious Defense**

5 The Supreme Court recently confirmed and clarified the standards applicable
6 to a request for attorneys' fees under the Copyright Act. *Kirtsaeng v. John Wiley &*
7 *Sons, Inc.*, 136 S. Ct. 1979 (2016).

8 The Copyright Act provides that "the court may . . . award a reasonable
9 attorney's fee to the prevailing party" 17 U.S.C. § 505. The Court has "broad
10 leeway . . ." in awarding attorneys' fees (*Kirtsaeng*, 136 S. Ct. at 1985) and "fee
11 awards under § 505 should encourage the types of lawsuits that promote" the
12 Copyright Act's "well settled" objective of "ultimately serv[ing] the purpose of
13 enriching the general public through access to creative works." *Kirtsaeng*, 136 S.
14 Ct. at 1986, *quoting Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

15 In exercising its discretion, "a district court may not 'award[] attorney's fees
16 as a matter of course'; rather, a court must make a more particularized, case-by-case
17 assessment." *Id.*, *quoting Fogerty*, 510 U.S. at 533; *Kirtsaeng*, 136 S. Ct. at 1985
18 ("§ 505 grants courts wide latitude to award attorney's fees based on the totality of
19 circumstances in a case"). Also, "a court may not treat prevailing plaintiffs and
20 prevailing defendants any differently; defendants should be 'encouraged to litigate
21 [meritorious copyright defenses] to the same extent that plaintiffs are encouraged to
22 litigate meritorious claims of infringement.'" *Id.*, *quoting Fogerty*, 510 U.S. at 527.

23 Further, whether the losing party had an objectively reasonable position may
24 be a factor, but it is "not the controlling one." *Kirtsaeng*, 136 S. Ct. at 1988, & at
25 1989 (Second Circuit "Court of Appeals' language at times suggests that a finding of
26 reasonableness raises a presumption against granting fees, . . . and that goes too far
27 in cabining how a district court must structure its analysis . . ."). Instead, "§ 505
28 confers broad discretion on district courts and, in deciding whether to fee-shift, they

1 must take into account a range of considerations beyond the reasonableness of
2 litigating positions For example, a court may order fee-shifting because of a
3 party’s litigation misconduct, whatever the reasonableness of his claims or
4 defenses.” *Id.* at 1988-89. The Court may also consider “frivolousness, motivation,
5 objective unreasonableness[,] and the need in particular circumstances to advance
6 considerations of compensation and deterrence.” *Id.* at 1985, *quoting Fogerty*, 510
7 U.S. at 534, n. 19. Ultimately, however, “courts must view all the circumstances of
8 a case on their own terms, in light of the Copyright Act’s essential goals.”
9 *Kirtsaeng*, 136 S. Ct. at 1989.

10 Applying these principles, Warner/Chappell should be awarded fees.

11 (b) **Warner/Chappell Is Properly Awarded Attorneys’ Fees Incurred in**
12 **Successfully Defending Plaintiff’s Copyright Infringement Claims**

13 (1) **Defendants’ Successful Defense of Plaintiff’s Infringement**
14 **Claims Furthered the Policies of the Copyright Act**

15 By successfully defending against plaintiff’s claims for direct, contributory
16 and vicarious copyright infringement, defendants fulfilled the “pivotal criterion” of
17 furthering the Copyright Act’s purpose. *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 558
18 (9th Cir. 1996); *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1432 (9th Cir. 1996)
19 (“This court has emphasized that in considering motions for attorney’s fees under §
20 505 of the Copyright Act, the district court should ‘seek to promote the Copyright
21 Act’s objectives’”), *quoting Historical Research v. Cabral*, 80 F.3d 377, 378-79 (9th
22 Cir. 1996). “[C]opyright law ultimately serves the purpose of enriching the general
23 public through access to creative works,” *Fogerty*, 510 U.S. at 527.
24 Oftentimes, the defendant has his own copyrighted work and he furthers the policy
25 of encouraging the public’s access to creative works by protecting his work from the
26 plaintiff’s challenge of infringement. *Id.* at 526. That was the case here.

27 The musical composition *Stairway to Heaven* is a work protected by
28 copyright. 17 U.S.C. § 102(a)(2) (“Works of authorship include . . . musical

1 works”). Plaintiff stated that *Stairway to Heaven* “is universally acknowledged as
2 one of the greatest songs ever written.” Plt’s First Am. Complaint (“FAC”) (Doc.
3 31) at 11, ¶ 56. Yet, plaintiff not only tried to tar *Stairway to Heaven* and its
4 authors, Jimmy Page and Robert Plant, but by claiming infringement he also
5 challenged *Stairway to Heaven*’s copyright. 17 U.S.C. § 103(a) (copyright “does not
6 extend to any part of the work in which [preexisting] material has been used
7 unlawfully”). Further, plaintiff expressly sought to deprive the public of the
8 *Stairway to Heaven* musical composition and recordings and sheet music of that
9 composition, praying in both his complaints for “[i]njunctive and other equitable
10 relief inclusive of but not limited to impoundment, destruction, and halting of sales
11 of *Stairway to Heaven* recordings and sheet music. Complaint (Doc. 1) at 28, ¶ (f);
12 FAC at 31, ¶ (f). Defendants successfully defended plaintiff’s attempt to wipe
13 *Stairway to Heaven* off the map and, in doing so, defendants furthered the important
14 copyright “purpose of enriching the general public through access to creative works,
15 ” *Fogerty*, 510 U.S. at 527.

16 Also, to ensure a proper balance of competing interests, copyright rights are
17 carefully “limited” by the Copyright Act. *Id.* at 526-27. As a result, “it is peculiarly
18 important that the boundaries of copyright law be demarcated as clearly as possible”
19 and the “successful defense of a copyright infringement action may further the
20 policies of the Copyright Act every bit as much as a successful prosecution of an
21 infringement claim” *Id.* at 527. Here, defendants successfully established that
22 the claimed similarities are limited to public domain elements such as a descending
23 chromatic line and the random pitches plaintiff’s experts plucked from the *Taurus*
24 and *Stairway to Heaven* compositions. Defendants’ successful defense served the
25 “peculiarly important” copyright policy of demarcating “the boundaries of copyright
26 law,” by establishing that use of these commonplace musical elements does not
27 support an infringement claim. Awarding defendants their attorneys’ fees is
28 important because “defendants who seek to advance a variety of meritorious

1 copyright defenses should be encouraged to litigate them” *Id.*; *see, also*
2 *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 (9th Cir.
3 1996) (affirming award of attorneys’ fees to prevailing defendant).

4 This is a text-book example of the “successful defense of a copyright
5 infringement action . . . furthering the policies of the Copyright Act every bit as
6 much as a successful prosecution of an infringement claim by the holder of a
7 copyright.” *Id.* For that reason alone, attorneys’ fees are properly awarded.

8 **(2) Plaintiff’s Extensive and Ongoing Litigation Misconduct Also**
9 **Justifies the Award of Defendants’ Attorneys’ Fees**

10 The Supreme Court also confirmed that the “court may order fee-shifting
11 because of a party’s litigation misconduct, whatever the reasonableness of his claims
12 or defenses.” *Kirtsaeng*, 136 S. Ct. at 1988-89. Here, plaintiff’s misconduct in
13 litigation started with the filing of his complaint in the wrong court with scurrilous
14 and improper allegations, and continued unabated into the Jury’s deliberations when
15 he falsely represented to the Court that the video exhibit the Jury requested had
16 never been played during the trial.¹

17 ***i. Plaintiff’s Filing of Complaints with Improper***
18 ***Allegations and in the Wrong Court, Followed by***
19 ***Plaintiff’s Repeated Filing of Meritless Motions***

20 Despite the fact that no defendant has offices or any jurisdictional presence in
21 Pennsylvania, plaintiff filed this action in the Eastern District of Pennsylvania.

22
23 ¹ Plaintiff’s Philadelphia counsel’s misconduct in this case is a continuation of
24 the misconduct that earned him a substantial monetary sanction as well as a three-
25 months-and-a-day suspension in the Eastern District of Pennsylvania. *In re Francis*
26 *Malofiy*, No. 15-2472, 2016 WL 3553258 (3d Cir. June 30, 2016); *Marino v. Usher*,
27 No. CIV. 11-6811, 2014 WL 2116114, at *1 (E.D. Pa. May 21, 2014) (“Throughout
28 this copyright litigation, Plaintiff’s Counsel, Francis Malofiy, has behaved in a
flagrantly unprofessional and offensive manner”). Plaintiff, having chosen his
Philadelphia counsel despite the charges and pending suspension, ratified his
counsel’s ongoing misconduct in this action.

1 Further, he fought to keep it there, putting forth objectively unreasonable arguments
2 that, although rejected by the District Court (*Skidmore v. Led Zeppelin*, 106 F. Supp.
3 3d 581, 587-88 (E.D. Pa. 2015)), nevertheless forced defendants to retain local
4 counsel and incur unnecessary fees in establishing that the case did not belong there.

5 Plaintiff also included in his complaints improper and false factual allegations.

6 For example, to sully the reputations of the individual defendants plaintiff
7 listed purported instances of prior settlements or potential-but-never-asserted
8 copyright infringement claims. Complaint at 4, ¶10; FAC at 4, ¶ 10). Plaintiff never
9 even attempted to prove the validity of those claims and any reasonable lawyer
10 would have known that prior claims and settlements are irrelevant. *United States v.*
11 *Bailey*, 696 F.3d 794, 800-01 (9th Cir. 2012) (“There is no logical relevancy to
12 admitting this type of evidence.”); Fed. R. Evid. 404(a)(1) & 408.

13 As another example, plaintiff repeatedly alleged that the 1967 Exclusive
14 Songwriter’s and Composer’s Agreement between Hollenbeck Music and Randy
15 Wolfe, which expressly provides it is governed by California law, is “void” because
16 Wolfe was a minor at the time and the 1967 Agreement was not approved by a
17 California court. Complaint at 6-7, ¶¶ 22-30. No reasonable plaintiff would make,
18 let alone persist in making those allegations given that (1) a minor’s contract is valid
19 unless promptly disaffirmed upon the minor attaining majority (Cal. Civ. Code § 35,
20 now Cal. Prob. Code § 6710); (2) plaintiff continues to this day to receive and accept
21 Hollenbeck’s royalty payments under the 1967 Agreement; and (3) a simple search
22 of the Court records confirms that the 1967 Agreement was approved by the
23 Superior Court in 1967. Order approving Agreement, Trial Exh. 2060. Yet, with no
24 legal basis, plaintiff repeatedly suggested at trial that the 1967 Agreement is invalid.

25 Plaintiff also filed a series of applications and motions, each of which lacked
26 merit and was denied or stricken by the Court, including:

- 27 • Plaintiff’s February 2, 2016 Application to Amend Scheduling Order,
28 denied (Doc. 95);

- 1 • Plaintiff's February 25, 2016 Motion to file Amended Complaint to
2 belatedly add defendants, denied (Doc. 133);
- 3 • Plaintiff's March 26, 2016 Motion to withdraw deemed admissions,
4 stricken (Doc. 153)
- 5 • Plaintiff's May 17, 2016 Motion to compel the individual defendants
6 to appear for trial, denied (Doc. 224);
- 7 • Plaintiff's June 11, 2016 Motions for sanctions and the exclusion of
8 defendants' musicologist, stricken (Doc. 233); and
- 9 • Plaintiff's June 12, 2016 Motion for reconsideration of the Court's
10 April 4, 2016 Order granting defendants partial summary judgment,
11 stricken (Doc. 233).

12 Plaintiff's meritless filings not only imposed substantial additional burdens on
13 the Court, but caused Warner/Chappell to incur additional attorneys' fees, including
14 in filing opposition papers.

15 ***ii. Plaintiff – Ignoring Clear Law that there Is No Copyright***
16 ***in the Taurus Sound Recording – Served Inadmissible***
17 ***Expert Reports, Forcing Warner/Chappell to Incur***
18 ***Additional Attorneys' Fees and Expert Fees***

19 Plaintiff specifically sued for infringement of the copyright in the *Taurus*
20 musical composition registered with the Copyright Office in 1968. Complaint at 7, ¶
21 34. And the law is unequivocally clear that the pre-February 15, 1972 *Taurus* sound
22 recordings are not protected by that copyright. *Dowling v. United States*, 473 U.S.
23 207, 211 n. 4 (1985) (“Congress did not extend federal copyright protection to sound
24 recordings until the Sound Recording Act of 1971 . . . and then only to sound
25 recordings fixed after February 15, 1972”). As a result, “Plaintiff’s only copyright
26 claim lies in the musical composition of *Taurus*, not the sound recording.” Order
27 (Doc. 159) on Defs’ MSJ at 17. No reasonable person could conclude otherwise.
28

1 Yet, plaintiff's initial expert disclosures included four reports based solely on
2 claimed similarities between *Stairway to Heaven* and the irrelevant *Taurus*
3 recordings, and never even mentioned the relevant copyrighted work, namely the
4 *Taurus* deposit copy. *See, e.g.*, Defs' MIL No. 4 (Doc. 137). Plaintiff's submission
5 of expert reports as to *Taurus* recordings instead of the *Taurus* deposit copy was
6 directly contrary to established law. *See, e.g.*, *Newton v. Diamond*, 388 F.3d 1189,
7 1194 (9th Cir. 2004) ("A crucial problem with the testimony of [plaintiff's] experts
8 is that they continually refer to the 'sound' produced by [plaintiff's] technique,"
9 while his "copyright extends only to the elements . . . that he wrote on the score"),
10 *cert. denied* 545 U.S. 1114 (2005).

11 Further, plaintiff's improper expert reports not only required that defendants
12 respond and object to them, but led to the Court's ruling that plaintiff's reports were
13 inadmissible and providing plaintiff leave to submit a second round of reports.
14 Order (Doc. 203). Because of plaintiff's initial submission of inadmissible reports,
15 followed by plaintiff's submission of new reports that inexplicably continued to rely
16 on the *Taurus* recordings, Warner/Chappell incurred yet additional attorneys' fees.
17 Plaintiff also refused to produce his experts for deposition until the Court rejected
18 his absurd argument that expert discovery had been cut-off with fact discovery.
19 Order (Doc. 216). Plaintiff's misconduct also required that defendants submit new
20 rebuttal reports and objections to plaintiff's new reports and his experts' continued
21 reliance on the *Taurus* recordings. *See, e.g.*, Defs' Trial Brief (Doc. 223) at 17-24.

22 Given that plaintiff sues on a copyright in the *Taurus* deposit copy and that the
23 *Taurus* sound recordings are inadmissible, it was improper and misconduct for
24 plaintiff to persist in trying to inject the *Taurus* sound recordings into this case.

25 ***iii. Plaintiff's Complete Failure to Comply with LR 16 and***
26 ***the Court's Order Re Pretrial Obligations***

27 Plaintiff also completely failed to comply with this Court's Local Rule 16 and
28 his pretrial obligations, including under the Court's Order for Jury Trial (Doc. 79).

1 For example, plaintiff failed to cooperate in the timely filing of the required
2 Joint Witness List, the required Joint Exhibit List and the required proposed Pretrial
3 Conference Order. *See*, Decl. (Doc. 201) *re* late filing of pretrial documents, at 1.

4 As another example, plaintiff insisted on including in the late-filed Joint
5 Exhibit List thousands of documents that no reasonable person could believe would
6 be admissible at trial, including plaintiff's listing of every document on the Court's
7 docket, entire deposition transcripts and hundreds of documents identified only
8 generically (such as 275 separate exhibits each designated only as unidentified
9 "Sheet Music Sold for Exploitation"). *Id.* at 2. Plaintiff also filed on the first day of
10 trial a 383-page Supplemental Exhibit List (Doc. 242) that added new exhibits and
11 re-numbered exhibits, causing confusion throughout the trial.

12 ***iv. Plaintiff's Misconduct up to and throughout Trial***

13 Plaintiff's misconduct continued up to and throughout the trial.

14 Plaintiff successfully resisted discovery as to his allegations that the Trust is a
15 charitable organization and uses its funds to buy instruments for needy children in
16 Ventura County, California. Given his refusal to allow discovery on those
17 allegations, and their lack of relevance and potential prejudicial effect, at the April
18 25, 2016 Pretrial Conference the Court tentatively granted defendants' Motion in
19 Limine No. 8 to exclude all evidence and argument as to plaintiff's and the Trust's
20 use of funds and any recovery in this action for charitable purposes. Order (202) at
21 2 ("Defendants' Motion in Limine 8 to exclude evidence about the charitable goals
22 of the Trust (DE 141), is GRANTED"). But plaintiff's counsel, knowing the Court's
23 ruling and the potential prejudicial effect on the jury pool, literally minutes later
24 stood before media cameras in front of the Courthouse and stated:

25 "If money is won in this case, it's to be used to buy musical
26 instruments for children who are in need in Ventura County."

27 Defs' Objections to Pltf's Trial Conduct (Doc. 252) at 1-2, 7. Plaintiff's public
28 statement was a willful violation of California Rule of Professional Responsibility

1 Rule 5-120(A), which prohibits public statements that could impact the trial. L. R.
2 83-3.1.2 (adopting Cal. Rules of Professional Responsibility).

3 Plaintiff also directly violated the Court's rulings on defendants' Motions in
4 Limine. For example, the Court granted defendants Motion in Limine No. 9 to
5 exclude pre-May 31, 2011 payments, including advances received after that date but
6 under the 2008 contract between two non-parties, WB Music Corp. and Flames of
7 Albion. Following that ruling, the Court sustained defendants' objection to
8 admission of the 2008 contract. Anderson Decl. Exh 4 (Trial Transcript) at 544:6 to
9 545:10. But, plaintiff then elicited testimony from his damages expert as to the
10 advances, which plaintiff and the expert mischaracterized as payments for post-2011
11 exploitation. *Id.* at 771:20 to 773:18. On cross-examination and only after the Court
12 intervened, did plaintiff's expert admit that the payments "were made under the
13 terms of [the] 2008 contract." *Id.* at 783:4-22. Plaintiff's expert's testimony as to
14 millions of dollars of payments was barred by the Court's ruling granting
15 defendants' Motion in Limine and was elicited by plaintiff in direct contempt of the
16 Court's ruling.

17 Plaintiff also violated another of the Court's in Limine rulings when, after the
18 Court confirmed on the first day of trial its ruling "exclud[ing] evidence about the
19 charitable goals of the Trust" (Order (Doc. 202) at 2), plaintiff's counsel elicited
20 from his first witness, Janet Wolfe, that the Trust is a charity:

21 "Q. What is the Randy Craig Wolfe Trust?

22 "A. It was my mother's mission to create a legacy for my brother, and
23 it benefits charity."

24 Anderson Decl. Exh. 4 (Trial Transcript) at 157:14-16. Plaintiff's counsel also
25 directly violated that ruling by stating in leading questions to plaintiff that the Trust
26 used its funds to buy instruments for children. *Id.* at 752:9-11 ("Is it accurate that the
27 assets of the Trust, estate, and its income shall be used for the purpose of providing
28 musical instruments and associated materials . . ."). Plaintiff persisted, over

1 sustained objections, in violating the Court’s ruling. *Id.* at 752:24 to 754:24.

2 In addition, on the eve of trial plaintiff purported to issue to defendants and to
3 non-parties “notices” to appear and trial subpoenas directed to unidentified “persons
4 most knowledgeable,” all without any basis in the Federal Rules of Civil Procedure
5 or otherwise. Anderson Decl. at 1, ¶ 4, & Exh. 2.

6 Throughout the trial plaintiff also falsely stated to the Jury, repeated in loaded
7 questions and stated to the press that plaintiff had engaged defendants’ musicologist,
8 who “flipped” to represent defendants.² Plaintiff also improperly and falsely stated
9 in opening argument that he would call defense counsel to the stand to testify as to
10 their supposed “duplicitous” conduct. Anderson Decl. Exh. 4 (Trial Transcript) at
11 125:20 to 126:3.

12 Also, in questioning John Paul Jones plaintiff misrepresented plaintiff’s
13 newly-re-numbered exhibit 100164 as being a recording of an interview in 1972
14 shortly after *Stairway to Heaven* was written, when, in truth, the exhibit is an
15 interview in 1990, or almost twenty years later. *Id.* at 943:4 to 944:22; Anderson
16 Decl. at 1-2, ¶ 5.

17 As another example of plaintiff’s gross misconduct, his counsel presented to
18 the Jury a photograph altered to omit two people and create the false impression that
19 Robert Plant was speaking with Mark Andes. Anderson Decl. Exh. 4 (Trial
20 Transcript) at 298:15 to 299:17; Defs’ Decl. *re* Pltf’s Altered Exh. 535 (Doc. 291),
21 Anderson Decl. at 2, ¶ 6, & Exh. 3; Cal. R. Prof. Responsibility 5-200(B)
22 (prohibiting counsel from “seek[ing] to mislead the judge, judicial officer, or jury by
23 an artifice”).

24 Plaintiff also misrepresented to the Court that the 1996 renewal of copyright
25 in the *Taurus* musical composition “terminated” Wolfe’s 1967 Agreement with

26 _____
27 ² [http://mms.tveyes.com/Transcript.asp?StationID=780&DateTime=6%2F18%
28 2F2016+1%3A11%3A21+AM&Term=Led+Zeppelin&PlayClip=TRUE](http://mms.tveyes.com/Transcript.asp?StationID=780&DateTime=6%2F18%2F2016+1%3A11%3A21+AM&Term=Led+Zeppelin&PlayClip=TRUE). *See, also*
Trial Transcript at 905:12-907:5.

1 Hollenbeck. Anderson Decl. Exh. 4 (Trial Transcript) at 720:8-10. Aside from the
2 fact that plaintiff testified he still receives payments from Hollenbeck under that
3 agreement, plaintiff’s representation that Wolfe’s renewal terminated the 1967
4 Agreement is plainly untrue. 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §
5 9.06[B] (“When the copyright owner transfers rights in the renewal term . . . and
6 survives until renewal vesting, then rights in the renewal term belong to the
7 assignee”); Defs’ Mtn. for JMOL (Doc. 250) at 2-4; *see, also* Cal. R. Prof.
8 Responsibility 5-200(B) (prohibiting counsel from seeking to mislead the court by
9 “false statement of fact or law”).

10 Plaintiff’s misconduct continued even into the Jury’s deliberations. When the
11 Jury asked to hear plaintiff’s expert’s recorded guitar performance of the *Taurus*
12 musical composition, plaintiff misrepresented to the Court that the Jury heard only
13 his expert’s performance of the bass clef of the composition, which misrepresents
14 the actual *Taurus* composition by leaving out the treble clef. Anderson Decl. Exh. 4
15 (Trial Transcript) at 1301:3-13, 1303:21 to 1304:5. In truth, the Jury had heard
16 plaintiff’s Exhibit 525a with the entire deposit copy performed (*id.* at 296:9-18), and
17 that is what they asked to hear.

18 Plaintiff is guilty of continued and gross misconduct throughout the case and,
19 for that additional reason, attorneys’ fees should be awarded.

20 **(3) The Factors Mentioned in Fogerty Also Confirm that**
21 **Attorneys’ Fees Are Properly Awarded**

22 *Kirtsaeng* highlighted objective unreasonableness and litigation misconduct as
23 alternative grounds to award attorneys’ fees to the prevailing party on a copyright
24 claim, but also recounted that *Fogerty* “noted” “several non-exclusive factors’ to
25 inform a court’s fee-shifting decisions: ‘frivolousness, motivation, objective
26 unreasonableness[,] and the need in particular circumstances to advance
27 considerations of compensation and deterrence.’” *Kirtsaeng*, 136 S. Ct. at 1985,
28 *quoting Fogerty*, 510 U.S. at 534, n. 19. “[C]ourts may not rely on [these] factors if

1 they are not ‘faithful to the purposes of the Copyright Act’” when applied in a
2 particular case. *Fantasy*, 94 F.3d at 558, quoting *Fogerty*, 510 U.S. at 34, n. 19.
3 However, those factors also cut in favor of a fee award here.

4 ***i. The Degree of Success Obtained on the Claim***

5 “In deciding whether to award fees under the Copyright Act, the district court
6 should consider, among other things: the degree of success obtained on the claim; . .
7 . . .” *Maljack*, 81 F.3d at 889. Defendants’ success is complete: Judgment has been
8 entered in their favor, dismissing plaintiff’s action in its entirety. The Copyright Act
9 is furthered by successfully defending a copyright claim. *Fogerty*, 510 U.S. at 527.

10 Also, in determining the degree of success the Court may compare the
11 plaintiff’s settlement position with the ultimate result. *Ingram v. Oroudjian*, 647
12 F.3d 925, 927 (9th Cir. 2011); *BWP Media USA Inc. v. Rich Kids Clothing Co.,*
13 *LLC*, 103 F. Supp. 3d 1242, 1246-47 (W.D. Wash. 2015). Here, even though
14 plaintiff’s potential recovery was limited to low six figures, he demanded
15 \$12,000,000 or co-ownership of the *Stairway to Heaven* copyright, neither of which
16 he could have recovered in this action even if he had prevailed. Defendants’
17 successful defense of claims for which plaintiff made such demands further confirms
18 the high degree of success defendants obtained.

19 The degree-of-success factor unequivocally cuts in favor of the award of fees.

20 ***ii. Frivolousness of Plaintiff’s Position***

21 If the prevailing defendant’s defense furthered the policies of the Copyright
22 Act, attorneys’ fees are properly awarded even if the plaintiff’s position was
23 reasonable. *Fantasy*, 94 F.3d at 558. But, frivolousness cuts in favor of a fee award,
24 *Maljack*, 81 F.3d at 889, and is further support for an award of attorneys’ fees here.

25 Plaintiff’s copyright infringement claims ran headlong into well-established
26 law confirming that the copyrighted work is limited to the *Taurus* deposit copy and
27 that there is no copyright protection for the elements on which plaintiff based his
28 claim: a commonplace descending chromatic line, the random selection of two or

1 three notes and the bare pitches that were not even in the same sequence. *Smith v.*
2 *Jackson*, 84 F.3d 1213, 1216, n. 3 (9th Cir. 1996) (“common or trite” musical
3 elements not protected); *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462
4 F.3d 1072, 1077 (9th Cir. 2006) (“non-protectable elements” must be “filter[ed] out
5 and disregard[ed]”), quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822
6 (9th Cir. 2002); *Swirsky v. Carey*, 376 F.3d 841, 848 n. 13 (9th Cir. 2004)
7 (“concentration solely on pitch sequence may break music down beyond
8 recognition”); Copyright Office Compendium §§ 313.4(B), 313.4(C) & 802.5(A)
9 (unprotected material includes chromatic scales, arpeggios and a “music phrase
10 consisting of three notes”).

11 While attorneys’ fees are properly awarded to a prevailing defendant even if
12 the plaintiff’s position was reasonable (*Fantasy*, 94 F.3d at 558), plaintiff’s claims
13 were not reasonable and this factor further confirms fees should be awarded.

14 ***iii. The Parties’ Respective Motivations***

15 Defendants’ motivation was and is to defend themselves and *Stairway to*
16 *Heaven* against claims of infringement and the impounding and enjoining of that
17 composition and recordings and sheet music of that composition. Defendants’
18 motivation furthered the Copyright Act’s purposes. *Fogerty*, 510 U.S. at 527
19 (“copyright law ultimately serves the purpose of enriching the general public
20 through access to creative works”). “[D]efendants who seek to advance a variety of
21 meritorious copyright defenses should be encouraged to litigate them” *Id.* For
22 that reason, alone, this factor cuts in favor of the award of attorney’s fees.

23 In addition, plaintiff’s motivation was base: after nearly a half-century of
24 inaction, plaintiff relied on public domain elements shared by the works to try to
25 coerce a massive settlement that he could not have achieved in this action even if he
26 had prevailed. Plaintiff’s motivation impedes the creation of new works and ignores
27 the boundaries of copyright protection, thereby frustrating the Copyright Act and its
28 important policies. *Fogerty*, 510 U.S. at 527.

1 The factor of motivation also cuts decidedly in favor of awarding fees.

2 ***iv. Objective Reasonableness of Factual and Legal Positions***

3 While, again, attorneys' fees are properly awarded to a prevailing defendant
4 even if the plaintiff's position was perfectly reasonable (*Fantasy*, 94 F.3d at 558),
5 plaintiff repeatedly took positions that were outright misconduct and, at a bare
6 minimum, were objectively unreasonable. *See, above* at 5-12. Even if viewed as
7 only objectively unreasonable, plaintiff's conduct supports the award of attorneys'
8 fees to defendants. *Maljack*, 81 F.3d 890 (attorneys' fees properly awarded to
9 prevailing defendant where plaintiff's "copyright claims . . . are, if not frivolous, at
10 least factually unreasonable," and "an award of fees may deter baseless suits").

11 While attorneys' fees are properly awarded because defendants' defense of the
12 case furthered the policies of the Copyright Act, plaintiff's objectively unreasonable
13 conduct also confirms attorneys' fees should be awarded.

14 ***v. The Need in Particular Circumstances to Advance***
15 ***Considerations of Compensation and Deterrence***

16 In terms of compensation and in order to achieve the equal treatment of
17 prevailing plaintiffs and defendants required by *Fogerty*, 510 U.S. at 534, "when the
18 prevailing party is the defendant, who by definition receives not a small award but
19 no award, the presumption in favor of awarding fees is very strong." *Eagle Serv.*
20 *Corp. v. H2O Industr. Serv. Inc.*, 532 F.3d 620, 625 (7th Cir. 2008), quoting
21 *Assessment Tech. of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 437 (7th Cir. 2004).

22 Compensation is especially important here because the attorneys' fees were
23 not borne by an insurer. Because the claim plaintiff asserts is so old,
24 Warner/Chappell's insurer denied coverage and Warner/Chappell itself has borne the
25 attorneys' fees it incurred in successfully defending against plaintiff's claim.
26 Anderson Decl. at 5, ¶ 16. That cuts strongly in favor of awarding Warner/Chappell
27 attorneys' fees.

28 ///

1 In addition, plaintiff sued nearly a half-century late even though the copyright
2 owner and Randy Wolfe had never sued and plaintiff's own experts admitted the
3 claimed similarity is based on a public domain descending chromatic line.
4 Accordingly, the interest in deterring potential claimants from asserting stale and
5 meritless copyright claims also cuts in favor of awarding attorneys' fees.

6 The successful defense of plaintiff's copyright claims satisfied the "the pivotal
7 criterion" of "[f]aithfulness to the purposes of the Copyright Act" (*Fantasy*, 94 F.3d
8 at 558), by furthering the copyright "purpose of enriching the general public through
9 access to creative works . . . ," and the "peculiarly important" copyright policy of
10 enforcing the "boundaries of copyright law." *Fogerty*, 510 U.S. at 527. For these
11 reasons alone, and because "defendants who seek to advance a variety of meritorious
12 copyright defenses should be encouraged to litigate them . . . ," attorneys' fees are
13 properly awarded. Further, plaintiff's litigation misconduct, as well as defendants'
14 complete success, their motivation, plaintiff's motivation and plaintiff's
15 unreasonable and even frivolous positions all confirm this is a proper case for the
16 award of attorneys' fees.

17 Accordingly, Warner/Chappell respectfully submits that its Motion for
18 attorneys' fees should be granted.

19 (c) **Apportionment of Attorneys' Fees between Plaintiff's Copyright**
20 **Claims and "Right of Attribution" Claim Would Be Improper: the**
21 **Claims are "Related Claims" Arising from the Same Core Facts**

22 The Court need not attempt to apportion fees between plaintiff's copyright
23 claims and "right of attribution" claim and, instead, for at least two reasons an award
24 under the Copyright Act properly includes the fees in defending the entire suit.

25 First, plaintiff's "right of attribution" claim was so patently unsupported by
26 law that no material time was spent on it. Anderson Decl. at 8, ¶ 18.

27 Second, it is well-established that a party who prevails on a claim for which
28 attorneys' fees are recoverable, can recover attorneys' fees on that claim and any

1 “related claims” on which the party also prevails. *The Traditional Cat Ass’n, Inc. v.*
2 *Gilbreath*, 340 F.3d 829, 833 (9th Cir. 2003), *quoting Entm’t Research Group, Inc.*
3 *v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1230 (9th Cir. 1997), *cert. denied*
4 523 U.S. 1021 (1998), *in turn quoting Hensley v. Eckerhart*, 461 U.S. 424, 434-35
5 (1983). Claims are “related” if they “involve a common core of facts or will be
6 based on related legal theories.” *Hensley*, 461 U.S. at 435 (emphasis added). Here,
7 plaintiff based his “right of attribution” claim solely on the allegation that Wolfe
8 “wrote . . . significant portions of ‘Stairway to Heaven.’” Complaint at 26, ¶ 186;
9 FAC at 29, ¶ 197. That allegation, of course, is the factual and legal basis for his
10 copyright infringement claims. As a result, plaintiff’s “right of attribution” and
11 copyright infringement claims “involve a common core of facts” and “related legal
12 theories” (*Hensley*, 461 U.S. at 435), namely that copyright infringement occurred.
13 The claims are “related claims” and attorneys’ fees are recoverable for both.

14 **(d) The Amount of Attorneys’ Fees Claimed Is Reasonable**

15 The amount of an attorneys’ fees award is determined by (1) calculating the
16 lodestar figure and (2) determining whether that lodestar figure should be adjusted.

17 **(1) Calculating the Lodestar Figure**

18 In setting a fee, the Court “must first determine the presumptive lodestar
19 figure by multiplying the number of hours reasonably expended on the litigation by
20 the reasonable hourly rate.” *Intel Corp. v. Terabyte Int’l, Inc.*, 6 F.3d 614, 622 (9th
21 Cir. 1993). “The lodestar amount presumably reflects the novelty and complexity of
22 the issues, the special skill and experience of counsel, the quality of representation,
23 and the results obtained from the litigation.” *Id.* To establish this “‘presumptively
24 reasonable’ lodestar figure,” the party seeking fees must “provide (1)
25 contemporaneous billing records, (2) counsel’s hourly rate, and (3) evidence that this
26 rate is reasonable for an attorney of like skill and experience.” *Discovery*
27 *Communic’ns, Inc., v. Animal Planet, Inc.*, 172 F. Supp. 2d 1282, 1292 (C.D. Cal.
28 2001).

1 As to “the number of hours reasonably expended on the litigation,” *Intel*
2 *Corp.*, 6 F.3d at 622, and excluding the time spent by the individuals’ New York
3 counsel, since August 2014 defendants’ counsel expended a total of 1,809.40 hours
4 in the defense of plaintiff’s claims through the entry of Judgment and June 30, 2016.
5 Anderson Decl. at 6, ¶ 17 (1,750.40 hours); Eidel Decl. at 5, ¶ 16 (16.40 hours);
6 Olesh Decl. at 4, ¶ 15 (42.6 hours). That time, which is detailed in the excerpts of
7 contemporaneous billing records attached to counsel’s Declarations, includes, for
8 example, the initial litigation of jurisdiction and venue in the Eastern District of
9 Pennsylvania; propounding and responding to extensive written discovery and
10 producing over 40,000 pages of documents; depositions of parties and non-parties,
11 including here and in London, England, Boston, Massachusetts and Memphis,
12 Tennessee; litigating defendants’ motion for summary judgment or partial summary
13 judgment, which, *inter alia*, resulted in the dismissal of three defendants, the
14 reduction of plaintiff’s potential recovery by 50% and confirmation that the *Taurus*
15 deposit copy is the relevant copyrighted work; litigation of multiple applications and
16 motions filed by plaintiff and successfully opposed by defendants; litigation of
17 extensive Motions in Limine, with defendants prevailing on all but two of the
18 seventeen motions filed; pretrial proceedings; and trial. Anderson Decl. at 6-8, ¶ 17,
19 & Exh. 1; Eidel Decl. at 5-6, ¶ 16, & Exh. 1. Warner/Chappell respectfully submits
20 that the total of 1,809.40 hours spent from inception of this action in 2014 through
21 June 30, 2016 reflects the efficient defense of this action and are reasonable.

22 In addition, since June 23, 2016 defendants’ counsel expended additional time
23 in preparing and completing the Notice of Motion for Attorneys’ Fees, this
24 Memorandum of Points and Authorities and the Declarations, defendants’ Motion
25 for additional costs and supporting papers, and defendants’ Application to Tax Costs
26 and proposed Bill of Costs. Anderson Decl. at 8, ¶ 19 (\$9,768); Eidel Decl. at 6, ¶
27 17 (\$1,550); Olesh Decl. at 5, ¶ 16 (\$1,400).

28 ///

1 As to the reasonableness of counsel’s hourly rate, defendants’ lead counsel
2 charged \$330 per hour, which is actually below “those prevailing in the community
3 for similar services.” *Intel*, 6 F.3d at 622. Defendants’ lead counsel has over 36
4 years’ experience in copyright and entertainment litigation and, for example, was
5 primarily in charge of the prevailing party’s case in *Stewart v. Abend*, 495 U.S. 207
6 (1990). Anderson Decl. at 2-4, ¶¶ 8-11. In this District, practitioners – like the
7 defendants’ counsel – with over 35 years of experience in copyright litigation
8 routinely charge upwards of \$750 an hour. Likewise, the hourly rates charged by
9 defendants’ local counsel in Philadelphia before the transfer of this action are well
10 within “those prevailing in [that] community for similar services.” Eidel Decl. at 1-
11 4, ¶¶ 3-11; Olesh Decl. at 1-3, ¶¶ 3-10.

12 Multiplying the hours reasonably spent in defending against plaintiff’s claim
13 through the filing of this Motion, by the applicable hourly rates for Messrs.
14 Anderson (\$587,411), Eidel (\$9,750) and Olesh (\$16,310) results in a total of
15 \$613,471 as the “‘presumptively reasonable’ lodestar figure.” *Intel*, 6 F.3d at 622.

16 **(2) Kerr Factors Confirm the Fee Is Reasonable**

17 “[T]he district court may adjust the ‘presumptively reasonable’ lodestar figure
18 based upon the factors listed in *Kerr v. Screen Actors Guild, Inc.* 526 F. 2d 67, 69-70
19 (9th Cir. 1975), *cert. denied* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976)
20 that have not been subsumed in the lodestar calculation.” *Intel*, 6 F.3d at 622. The
21 *Kerr* factors include “[t]he amount involved and the results obtained” and “the
22 customary fee.” *Intel*, 6 F.3d at 622.

23 As to the amount involved, plaintiff demanded \$12,000,000 or co-ownership
24 of the *Stairway to Heaven* copyright for the duration of copyright. Under either
25 proposal, plaintiff sought millions of dollars and defendants were perfectly justified
26 in spending \$613,471 to defend against his claims. As to the results obtained, the
27 defendants successfully defended all of plaintiff’s claims and obtained Judgment in
28 defendants’ favor. And, as to the customary fee, defendants’ counsel charged hourly

1 rates commensurate with or substantially below the customary rate in the community
2 for attorneys with comparable experience in the field.

3 Accordingly, the *Kerr* factors confirm that the requested fee award is
4 reasonable.

5 **3. CONCLUSION**

6 Defendants – faced with plaintiff’s ongoing misconduct and objectively
7 unreasonable positions – triumphed against plaintiff’s claims for permanent
8 injunctive relief that would have deprived the public of the *Stairway to Heaven*
9 musical composition, recordings and sheet music. The successful defense of
10 plaintiff’s claims furthered the purposes of the Copyright Act and the sum of
11 \$613,471 in attorneys’ fees is reasonable. Accordingly, those fees and the fees
12 hereafter incurred by Warner/Chappell in connection with this Motion and the
13 accompanying Motion and Application, are properly awarded to Warner/Chappell.

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15 Dated: July 7, 2016

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/s/ Peter J. Anderson
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