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9 And Koil Content Creation Pty Ltd.

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

12 THAT ONE VIDEO  
13 ENTERTAINMENT, LLC, a California  
14 limited liability company,

15 Plaintiff,

16 v.

17 KOIL CONTENT CREATION PTY  
18 LTD., an Australian proprietary  
19 limited company doing business as  
20 NOPIXEL; MITCHELL CLOUT, an  
21 individual; and DOES 1-25,  
22 inclusive,

23 Defendants.

24 Case No. 2:23-CV-02687 SVW  
(JCx)

25 Hon. Stephen V. Wilson

26 DEFENDANTS NOTICE OF  
27 MOTION AND MOTION FOR  
28 ATTORNEY’S FEES;  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
THEREOF

[Filed or lodged concurrently  
herewith: (1) Declaration of Keith L.  
Cooper; (2) Declaration of Larry  
Zerner; and (3) Proposed Order.]

Date: December 9, 2024  
Time: 1:30 p.m.  
Place: Courtroom 10A

Action Filed: April 10, 2023

1                   **TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:**

2  
3                   **PLEASE TAKE NOTICE THAT** on December 9, 2024 at 1:30 p.m. or as  
4 soon thereafter as the parties may be heard, before the Honorable Stephen V. Wilson,  
5 United States District Judge, in Courtroom 10A, located at 350 W. First Street, Los  
6 Angeles, California 90012, Defendants Mitchell Clout and Koil Content Creation Pty  
7 Ltd. (collectively, “Defendants”) will and hereby do move the Court for an award of  
8 reasonable attorney's fees pursuant to Section 505 of the Copyright Act (17 U.S.C. §  
9 505) on the ground that they are the prevailing party in this copyright action.

10                   Defendants seek an award of attorney's fees in the amount of **\$232,578.42** *plus*  
11 whatever fees are incurred in preparing a Reply to any Opposition by Plaintiffs to  
12 this Motion, to be established in a supplemental Declaration to be filed with that  
13 Reply.

14                   This Motion is based on this Notice of Motion and Motion and the  
15 Memorandum of Points and Authorities attached hereto, the Declarations of Keith L.  
16 Cooper, and Larry Zerner filed concurrently herewith, the file and record in this case,  
17 and any further argument or evidence that may be presented to or considered by the  
18 Court prior to its ruling.

19                   This Motion is made following the conference of counsel pursuant to L.R. 7-3,  
20 which took place on October 30, 2024.

21  
22 Dated: November 7, 2024

Respectfully submitted,

23                   **ZERNER LAW**

24  
25 By: /s/Larry Zerner

26                   Attorneys for Defendants Koil Content  
27                   Creation Pty. Ltd. *and* Mitchell Clout

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION .....	6
II. RELEVANT PROCEDURAL HISTORY.....	6
III. RELEVANT UNDISPUTED FACTS.....	7
IV. POINTS & AUTHORITIES.....	10
a. The Facts of This Case are Undisputed.....	10
b. Defendants are the “Prevailing Parties” .....	11
c. As Prevailing Party, Defendants are entitled to Attorneys’ Fees.....	11
V. COURT DISCRETION TO AWARD FEES.....	16
1. The Degree of Success Obtained.....	17
2. Frivolousness and Objective Unreasonableness.....	17
3. Improper Motivation.....	19
4. Awarding Attorneys’ Fees and Costs Would Deter Meritless Infringement Claims.....	21
VI. DEFENDANTS’ ATTORNEYS’ FEES AND COSTS REASONABLE.....	25
A. Defendants’ Attorneys’ Rates Are Reasonable.....	25
B. Counsel for Defendant Spent Reasonable Amount Of Time Litigating The Merits Of Plaintiff’s Action, Considering How Much Work Was Involved. ....	27
C. Defendants Requests An Award of Allowable Costs.....	28
D. Defendants are Also Entitled To Recover Fees And Costs Incurred In Connection With This Motion.....	29
VII. CONCLUSION.....	29

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

1

2

3 *AF Holdings LLC v. Navasca,*

4       No. C12-2396 EMC, 2013 WL 3815677 (N.D. Cal. July 22, 2013).....21

5 *Blum v. Stevenson*, 465 U.S. 886 (1984) .....25

6 *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008).....29

7 *Doc’s Dream, LLC v. Dolores Press, Inc.,*

8       959 F.3d 357, 363 (9th Cir. 2020).....12, 13, 14, 15, 16

9 *DuckHole Inc. v. NBCUniversal Media LLC,*

10       No. CV-12-10077-BRO, 2013 WL 5797204 (C.D. Cal. Oct. 25, 2013).....17

11 *Erickson Prods. Inc. v. Kast,*

12       No. 5:13-CV05472-HRL, 2016 WL 3951659, (N.D. Cal. July 22, 2016).....18

13 *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145 (9th Cir. 2001).....25

14 *Fogerty v. Fantasy Inc.*, 510 U.S. 517 (1994).....16, 17, 24

15 *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992).....26

16 *Gilbert v. New Line Prods., Inc. et al.,*

17       No. CV 09-02231-RGK, 2010 WL 5790688 (C.D. Cal. Dec. 6, 2010).....17

18 *Glass v. Sue,*

19       No. CV 09-8570-RGK SHX, 2011 WL 561028 (C.D. Cal. Feb. 8, 2011).....17, 18

20 *Hensley v. Eckerhart*, 461 U.S. 424 (1983).....11, 26

21 *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016).....13, 16, 18, 22, 24

22 *Lawrence v. Sony Pictures Ent. Inc.,*

23       No. CV-04737-SVW, 2011 WL 13217267 (C.D. Cal. Nov. 5, 2011).....17

24 *Marcus*, 2017 WL 5592470.....19

25 *Morales v. City of San Rafael*, 96 F.3d 359 (9th Cir. 1996).....25

26 *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992).....25

27 *Perfect 10, Inc. v. Giganews, Inc.,*

28

1 No. CV 11- 07098-AB SHX, 2015 WL 1746484, *aff'd*, 847 F.3d 657  
2 (9th Cir. 2017).....17, 18  
3 *Rano v. Sipa Press, Inc*, 987 F.2d 580, 584 (9th Cir. 1993).....14  
4 *Scott v. Meyer*,  
5 No. CV 09-6076 ODW(RZX), 2010 WL 2569286  
6 (C.D. Cal. June 21, 2010).....21  
7 *Shame on You Prods., Inc. v. Banks*, 893 F.3d 661 (9th Cir. 2018).....19, 20  
8 *Tresóna Multimedia, Ltd. Liab. Co. v. Burbank High Sch. Vocal Music*  
9 *Ass’n*, 953 F.3d 638, 653 (9th Cir. 2020).....16

11 **STATUTES**

12 17 U.S.C. § 505.....*passim*  
13 28 U.S.C. §§ 2201.....15

16 **RULES**

17 C.D. Cal. R. 54-1 .....11  
18 C.D. Cal. R. 56-3 .....11  
19 Fed. R. Civ. P. 56(e).....10, 11

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3  
4 Plaintiff filed the present lawsuit under the Copyright Act falsely claiming that it  
5 had a joint copyright ownership in Defendants’ computer servers and that Plaintiff  
6 was therefore entitled to 50% of the profits in the revenue earned from these servers.

7 The Court granted Defendants’ motion for summary judgment (the “MSJ”), after  
8 Plaintiff did not file an opposition to the MSJ and instead stipulated that the court  
9 should grant judgement in Defendants favor. In doing so, Plaintiff impliedly  
10 conceded that its case was without any factual basis.

11 As the prevailing party, Defendants are entitled to recover their attorneys’ fees  
12 and costs pursuant to the Copyright Act because (i) Defendants achieved a complete  
13 victory in their defense against Plaintiff’s claims, (ii) Plaintiff asserted an objectively  
14 unreasonable if not frivolous claim, (iii) Plaintiff’s conduct before and during the  
15 litigation shows Plaintiff’s improper motivations in pursuing its claims, (iv) an  
16 award of attorneys’ fees is necessary to advance considerations of compensation  
17 (i.e., to ensure that other defendants are not discouraged from protecting their  
18 legitimate rights) and deterrence (i.e., to discourage other plaintiffs from asserting  
19 similarly unmeritorious claims), *and* (v) these factors also further the purposes of the  
20 Copyright Act.

21 The fees that Defendants seek are manifestly reasonable considering the  
22 prevailing market rates for attorneys with a similar level of experience and expertise  
23 and the time necessarily spent in the defense of Plaintiff’s claims. Defendants  
24 therefore, respectfully request that the Court award their reasonable attorneys’ fees  
25 and costs in the total amount of \$222,183.42, in addition to the \$10,395.00 in fees  
26 they incurred in connection with this motion.

27 **II. RELEVANT PROCEDURAL HISTORY**

1 On July 7, 2023, Plaintiff That One Video Entertainment (“TOVE”) filed its  
2 First Amended Complaint (“FAC”) asserting three causes of action against  
3 Defendants KOIL CONTENT CREATION PTY LTD., dba NOPIXEL and  
4 MITCHELL CLOUT (collectively “Defendants”). The three causes of action are: (1)  
5 Declaratory Relief; (2) Breach of Contract; and (3) Accounting.  
6  
7

8 Specifically, Plaintiff sought a declaration concerning the parties’ respective  
9 rights in and to certain *copyrighted material* provided to Defendants. It was based on  
10 alleged “creative contributions” made by its alleged employee (Daniel Tracey).  
11

12 Plaintiff expressly made these claims “**pursuant to the Copyright Act**” (FAC at  
13 Paragraph 23). It also sought a determination of the parties’ respective rights ***in and***  
14 ***to any and all copyrights*** (FAC at Paragraph 22) and ***joint ownership interest in and***  
15 ***to any and all copyrights*** (FAC at Paragraph 23).  
16  
17

18 On September 10, 2024, Plaintiff moved for summary judgment on its FAC. That  
19 motion was ***denied***. On October 21, 2024, NoPixel and Clout (collectively, the  
20 “Defendants”) moved for summary judgment. Plaintiff did ***not*** oppose the motion,  
21 which was subsequently ***granted*** by this court.  
22  
23

### 24 **III. RELEVANT UNDISPUTED FACTS**

25 As Defendants’ motion for summary judgment was unopposed, the following  
26 are the *undisputed* facts relevant to the current motion. *All factual references*  
27  
28

1 *contained herein are included in Defendants’ Separate Statement of Facts, supported*  
2 *by documents and declarations, in Defendants’ unopposed Motion for Summary*  
3 *Judgment.*

4  
5 In 2016, Defendants created and began operating the “NoPixel Servers,”  
6 which allows players of the video game “Grand Theft Auto V” to create and play  
7 new and unique scenarios that are not part of the base Grand Theft Auto game. In  
8 April 2020, Daniel Tracey acquired an account as a player on the NoPixel server.  
9 When he signed up, he was required to agree to the NoPixel terms of service  
10 (“**Terms**”). *Tracey did, in fact, sign up and agree to be bound by those Terms.*  
11 Defendants produced evidence of Tracey’s acceptance of these terms.  
12  
13  
14

15 The Terms *expressly* stated that (1) a content provider, such as Tracey, granted  
16 Defendants a “non-exclusive, permanent, irrevocable, unlimited license to use,  
17 publish, or re-publish” the “Content”; (2) the content provider would retain copyright  
18 ownership over the Content; and (3) “Content” is defined as “All content you submit,  
19 upload, or otherwise make available to the Service.” Tracey did *not* deny that he  
20 agreed to these Terms, which applied to all copyrightable material provided by the  
21 members on the server. Tracey further acknowledged this in his deposition, affirming  
22 that he owned the copyright to the work he created prior to working for Plaintiff,  
23 while Plaintiff owned the copyright to his contributions created thereafter.  
24  
25  
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1           Despite this Plaintiff has argued that the copyrighted material was a “joint  
2 work” or “jointly owned,” presumably to get this matter before this court (see below:  
3 if there was no dispute over copyright ownership this matter would not be in Federal  
4 Court). Yet, the undisputed facts demonstrate there was no “joint ownership” and no  
5 intent to create a joint work (the Terms clearly state the content is owned by Tracey  
6 and licensed to Defendants). Further, Plaintiff never proffered any evidence that  
7 Defendants intended for this to be a “joint work” or jointly owned. In fact, the Terms  
8 indicate the contrary (Defendants were not asserting any ownership over it). In any  
9 case, Tracey’s contribution to the overall code was less than one percent of the total  
10 code contained on the servers as Tracey was only one of *dozens* of contributors.  
11

12           Additionally, Plaintiff failed to produce any evidence that it even owns  
13 Tracey’s copyrightable contributions. Plaintiff failed to produce evidence that, as  
14 Plaintiff alleged, it entered into an agreement with Defendants to “loan out” the  
15 services of Tracey to Defendants (as a precursor to its ownership). Plaintiff did  
16 produce an “employment agreement” with Tracey, which unequivocally failed to  
17 mention anything about lending his services to third parties. Plus, Plaintiff admitted  
18 it *never* spoke to Defendants about Tracey, Tracey’s employment, Tracey’s  
19 contributions, joint ownership or any agreement at all.  
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21  
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26           In fact, at the time of the alleged employment with Plaintiff, *Tracey had been*  
27 *working for Defendants as a developer for over a year.* All invoices for Tracey’s  
28

1 work were paid to Tracey personally, without any reference to Plaintiff.  
2  
3 Additionally, in preparing an H-1B visa application that would enable Plaintiff to  
4 hire Tracey (so Tracey could remain in the United States), Plaintiff's principal  
5 (Jacques Khalil) stated, under penalty of perjury, that he was hiring Tracey to work  
6 full-time as *Plaintiff's* developer and lead designer. Nowhere did it mention Tracey  
7 would be spending all or any part of his workdays working for Defendants. And  
8 Tracey kept 100% of the money he was paid by Defendants. Despite this, Plaintiff  
9 claims Defendants agreed to make Tracey a "50% partner" despite the **undisputed**  
10 evidence to the contrary that Tracey was entitled to some revenue from only 4 of the  
11 over 170 servers.  
12  
13

14  
15 In sum, Plaintiff asserted numerous claims against Defendants without  
16 providing any supporting facts or evidence, including in opposition to Defendants'  
17 motion for summary judgment. Plaintiff presented no evidence of copyright  
18 ownership, joint authorship, or any relevant agreements with Defendants.  
19 Consequently, Plaintiff has effectively conceded that its claims are frivolous, lack  
20 merit, and were brought for an improper purpose.  
21  
22

#### 23 **IV. POINTS & AUTHORITIES**

##### 24 **(a) The Facts of This Case are Undisputed**

25 Section 56(e) Federal Rule of Civil Procedure states, in pertinent part, if a  
26 party fails to properly address another party's assertion of fact, the court may  
27  
28

1 consider the fact undisputed. Fed. R. Civ. P. 56(e). The Court may also assume that  
2 material facts claimed and supported by a moving party (in an MSJ) are admitted to  
3 exist without controversy unless controverted by declaration or other evidence. C.D.  
4 Cal. R. 56-3.  
5

6 In the present case, Plaintiff has presented *no* evidence to controvert the now-  
7 undisputed facts that: (1) Tracey granted Defendants a license to incorporate his code  
8 into the NoPixel server; (2) there was no agreement to “loan out” Tracey’s services  
9 to Defendants; *and* (3) the code is not a joint work, and neither Tracey nor Plaintiff  
10 qualifies as a joint author thereof.  
11  
12

13 **(b) Defendants are the “Prevailing Parties”**

14 Pursuant to Local Rule 54-1 a “prevailing party” is “the party in whose favor a  
15 judgment is rendered. . .” C.D. Cal. R. 54-1. Summary judgment is a judgment that  
16 favors the party in whose favor the judgment was granted thereby establishing them  
17 as the prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (A prevailing  
18 party is one who has been awarded some relief by the court, which includes winning  
19 a motion for summary judgment).  
20  
21

22 Defendants prevailed on their unopposed motion for summary judgment and  
23 are, therefore, the prevailing party in this action.  
24

25 **(c) As Prevailing Party, Defendants are entitled to Attorneys’ Fees**

26 The United States Copyright Act provides for the recovery of attorney’s fees  
27 in favor of a prevailing party. 17 U.S.C. § 505. The fee award may be made “as part  
28

1 of the costs” and applies to “any party other than the United States or an officer  
2 thereof.” *Ibid.* Attorney’s fees may be awarded pursuant to the court’s discretion, in  
3 “any civil action” under Title 17. *Ibid.*

4  
5 A “civil action” under Title 17 is *not* limited to claims of copyright  
6 infringement. In fact, a claim for Declaratory Relief premised on the need to construe  
7 the provisions of the Copyright Act allows the court to grant attorney fees to the  
8 prevailing party. *Doc’s Dream, LLC v. Dolores Press, Inc.*, 959 F.3d 357, 363 (9th  
9 Cir. 2020) (*citing* Nimmer on Copyright, Section 14.10, Attorney Fees).

10  
11  
12 In *Doc’s Dream*, the federal district court granted summary judgment in favor  
13 of defendant on plaintiff’s complaint seeking a declaration that defendant abandoned  
14 his works to the public domain. *Id* at 358. The defendant moved for attorney’s fees  
15 under the Copyright Act on the grounds that U.S. Code Title 17, §505 allows the  
16 court to award a reasonable attorney’s fee to the prevailing party in “any civil action  
17 under this title.” *Ibid.* The district court denied the motion, holding that attorney’s  
18 fees were not available because the determination of copyright abandonment did not  
19 require “construction” of the Copyright Act. *Id* at 359.

20  
21  
22 However, on appeal, the appellate court held that, *even when asserted as a*  
23 *claim for declaratory relief*, any action that turns on the existence of a valid  
24 copyright and whether that copyright has been infringed invokes the Copyright Act,  
25 and thus attorney’s fees may be available under §505. *Ibid* (emphasis added). Of  
26 note, the defendant in *Doc’s Dreams* argued it was eligible for attorney’s fees where,  
27  
28

1 *similar to the present case*, the plaintiff’s claim for declaratory relief was (1)  
2 unreasonable given its slim chance of success, (2) brought in bad faith, and (3)  
3 worthy of deterrence as a meritless claim that forced defendant to incur defensive  
4 legal costs. *Id* at 359 (citing *Kirtsaeng v. John Wiley & Sons, Inc.* 136 S. Ct. 1979,  
5 1985 (2016)).  
6

7  
8 The *Doc’s Dream* case noted that defendants’ appeal raised an issue of first  
9 impression in the Ninth Circuit: *whether Doc’s Dream’s underlying action seeking*  
10 *declaratory relief sufficiently invoked the Copyright Act as to allow for an award of*  
11 *attorney’s fees under §505. Ibid* (emphasis added). The Appeals Court then  
12 reaffirmed that, in any civil action under title 17, the court in its discretion may allow  
13 the recovery of full costs against any party...[and] may also award a reasonable  
14 attorney’s fees to the prevailing party. *Ibid*.  
15  
16

17 The Appeals Court found it was not necessary for a declaratory relief action to  
18 require "construction" of the Copyright Act. *Ibid*. It also did not matter whether the  
19 claim was based on “equity”. *Ibid*. It found that “construction” of the Copyright Act  
20 was not so limited. *Id* at 361. It then referred to an example of a case where one party  
21 sued another seeking a declaration regarding copyright (e.g., whether defendant  
22 performed services on a for-hire basis, whether one party owned the copyright...***or***  
23 ***as an equal co-owner***). *Ibid* (emphasis added).  
24  
25  
26

27 The Court found that, in that example, jurisdiction in federal court arises under  
28 the Declaratory Relief Act *as well as being premised on the need to construe the*

1 *provisions of the Copyright Act: So, the Copyright Act allows courts, in their*  
2 *discretion, to grant attorney's fees to the prevailing party under those circumstances.*  
3  
4 *Ibid* (emphasis added). And the same consideration controls any time the action at  
5 hand requires construction of the Copyright Act, such as a claim for a declaration the  
6 work falls outside the scope of copyright protection, or the rights accorded to the  
7 copyright owner. *Ibid*.

9       Lastly, the *Doc's Dream* court held that, while a contract dispute over  
10 royalties due under an *accepted copyright* (not a dispute over copyright ownership)  
11 may be beyond the scope of federal law, where the scope of the copyrights is at  
12 issue, i.e., *where the parties dispute copyright ownership or usage*, allows for the  
13 discretionary award of attorney's fees. *Doc's Dream* at 361 – 362 (emphasis added).  
14 In that case, *as here*, the *complaint specifically invoked the Copyright Act*: "[A]n  
15 action arises under the federal copyright laws *if...the complaint is for a remedy*  
16 *expressly granted by the Act...or asserts a claim requiring construction of the Act.*"  
17 *Id* at 362 (citing *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 584 (9th Cir. 1993)).

21       In the present case, *Plaintiff's complaint specifically invokes the Copyright Act*  
22 *and seeks a declaration concerning joint ownership rights*. Plaintiff alleged:

24       (1) "An actual controversy has arisen and now exists between TOVE and  
25 Defendants ***regarding the parties' respective rights in and to any and all***  
26 ***copyrights*** derived from Mr. Tracey's creative contributions to the NoPixel  
27 Server." *FAC* at P. 22.

1 (2) TOVE seeks the Court's determination as to *whether TOVE is entitled*  
2 *to assert a joint ownership interest in and to any and all copyrights*  
3 *derived from Mr. Tracey's creative contributions to the NoPixel Server,*  
4 *pursuant to the Copyright Act. Id* at P. 23.

6 (3) An actual and justifiable controversy has arisen and now exists  
7 between TOVE and Defendants *regarding TOVE's claim to joint*  
8 *ownership of any and all copyrights* derived from Mr. Tracey's creative  
9 contributions to the NoPixel Server, and a declaration from this Court is  
10 therefore warranted under the Declaratory Judgment Act, 28 U.S.C. §§  
11 2201, et seq., to establish such parties' respective rights and obligations."  
12 *Id* at P. 24.

13  
14  
15  
16 Regarding this last claim, it is important to note that the *Doc's Dream* case  
17 specifically held that, asserting the case was not brought under the Copyright Act but  
18 rather one that was brought under the Declaratory Judgment Act ('DJA'), fails as it  
19 is based on a misunderstanding of the scope of the DJA and the interplay required  
20 between it and federal questions of law. *Doc's Dream* at 363. It held: The DJA and  
21 Copyright Act work in tandem. *Ibid.* And, in certain circumstances, "jurisdiction in  
22 federal court arises under the Declaratory Relief Act as well as being premised on  
23 the need to construe the provisions of the Copyright Act." (*Id.*, citing Nimmer  
24 §14.10[B][1][b]) ("[T]he kinds of issues which give right of entrance to federal  
25 courts...was not altered by the Declaratory Judgment Act."). The court noted *it is*

1 “unclear how, absent the Copyright Act, Doc’s Dream would have asserted federal  
2 court jurisdiction.” *Id* at 363 (emphasis added). **This is precisely what occurred in**  
3 **the present case.**

4  
5 **V. COURT DISCRETION TO AWARD FEES**

6  
7 Defendant is entitled to its costs and reasonable attorney fees. As noted above,  
8 Section 505 of the Copyright Act authorizes the recovery of full costs, and the award  
9 of reasonable attorney’s fees to the prevailing party as part of the costs. “A court  
10 may not treat prevailing plaintiffs and prevailing defendants differently [in a  
11 copyright case].” *Kirtsaeng v. John Wiley & Sons*, 579 U.S. 197, 202 (2016); *see*  
12 *also Fogerty v. Fantasy Inc.*, 510 U.S. 517 (1994). Costs and fees are awarded in the  
13 discretion of the court, not as a matter of course (*Kirtsaeng* at 4) nor in the court’s  
14 “unconstrained discretion,” (*Kirtsaeng* at 6), but rather in discretion informed by  
15 several nonexclusive factors (discussed below). *Fogerty* at 517-18.

16  
17  
18  
19 In deciding whether to award attorneys’ fees, courts conduct a case-by-case  
20 analysis and consider, but are not limited to, the following five factors: (1) the degree  
21 of success obtained, (2) frivolousness, (3) motivation, (4) [objective] reasonableness  
22 of [the] losing party’s legal and factual arguments, and (5) the need to advance  
23 considerations of compensation and deterrence. *Tresóna Multimedia, Ltd. Liab. Co.*  
24 *v. Burbank High Sch. Vocal Music Ass’n*, 953 F.3d 638, 653 (9th Cir. 2020) (*citing*  
25  
26  
27  
28



1 Wall Data Inc. v. L.A. County Sheriff’s Dep’t, 447 F.3d 769, 787 (9th Cir. 2006));  
2  
3 *see also* Fogerty, 510 U.S. at 534 n.19.

4 **1. The Degree of Success Obtained.**

5  
6 In this case, Defendants achieved complete success on the merits. The first  
7 factor “weighs more in favor of a party who prevailed on the merits, rather than on a  
8 technical defense.” *DuckHole Inc. v. NBCUniversal Media LLC*, No. CV-12-10077-  
9 BRO, 2013 WL 5797204, at \*2 (C.D. Cal. Oct. 25, 2013) (citing *Fogerty*, 510 U.S.  
10 at 556). Here, Defendants prevailed on *all* of Plaintiff’s claims on a motion for  
11 summary judgment, which constitutes complete success on the merits. *Lawrence v.*  
12 *Sony Pictures Ent. Inc.*, No. CV-04737-SVW, 2011 WL 13217267, at \*1 (C.D. Cal.  
13 Nov. 5, 2011) (Wilson, S. presiding); *aff’d* 534 Fed. App’x. 651 (9th Cir. 2013) (the  
14 “[d]efendants achieved complete success on the merits” where the court granted the  
15 defendants motion for summary judgment by “dismissing [p]laintiff’s three  
16 copyright claims on the merits”); *Gilbert v. New Line Prods., Inc. et al.*, No. CV 09-  
17 02231-RGK, 2010 WL 5790688 (C.D. Cal. Dec. 6, 2010) (same).

18  
19  
20  
21  
22 **2. Frivolousness and Objective Unreasonableness.**

23  
24 “Objective unreasonableness” is used to describe claims that have no legal or  
25 factual support. *Glass v. Sue*, No. CV 09-8570-RGK SHX, 2011 WL 561028, at \*4  
26 (C.D. Cal. Feb. 8, 2011) (citing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1120  
27 (9th Cir. 2007)). Further, a claim that is not objectively unreasonable at the outset  
28

1 can become so if the litigant continues to pursue it after the litigant knew or should  
2 have known that his or her claims had no legal or factual support. *Erickson Prods.*  
3 *Inc. v. Kast*, No. 5:13-CV05472-HRL, 2016 WL 3951659, at \*2 (N.D. Cal. July 22,  
4 2016). When a district court rules on the merits of a copyright claim, as in this case,  
5 it “can easily assess whether the losing party advanced an unreasonable claim or  
6 defense.” *Kirtsaeng*, 579 U.S. at 206. Similarly, a claim is considered frivolous  
7 “when the ‘result is obvious, or the arguments are wholly without merit.’” *Perfect*  
8 *10, Inc. v. Giganews, Inc.*, No. CV 11- 07098-AB SHX, 2015 WL 1746484 (citing  
9 *Glass*, 2011 WL 561028, at \*3), *aff’d*, 847 F.3d 657 (9th Cir. 2017).

13 In this case, Plaintiff’s claims at all times were frivolous and unreasonable.  
14 Not only were they never supported by evidence, but Plaintiff also *admitted* the  
15 claims lacked merit by, among other things, *not* even opposing the evidence  
16 presented by Defendants. Thus, e.g., while Plaintiff claimed there was a dispute  
17 regarding the parties’ respective rights in and to any and all copyrights derived from  
18 Mr. Tracey’s creative contributions to the NoPixel Server, after two years of  
19 litigation, Tracey admitted either he or Plaintiff solely owned the content, and he did  
20 not deny that he signed the Terms expressly licensing it to Defendants. *Plaintiff knew*  
21 *these facts prior to filing the lawsuit.*

26 Further, when Plaintiff filed its FAC seeking the “Court’s determination as to  
27 *whether TOVE is entitled to assert a joint ownership interest in and to any and all*  
28

1 *copyrights* derived from Mr. Tracey’s creative contributions” it knew there was no  
2 joint interest in the copyrights. It knew it never had an agreement to loan Tracey out  
3 to Defendants and it knew that Tracey licensed the content to Defendants. Plaintiff  
4 admitted this by not opposing the undisputed facts.  
5

6  
7 Despite this, to avoid imposition of an attorney fee award under Section §505  
8 of the Copyright Act, Plaintiff claims it was not seeking relief under that Act, despite  
9 (a) expressly stating in its FAC that its claims were “*pursuant to the Copyright Act*”;  
10 and (b) seeking a determination concerning its rights under the copyright joint  
11 authorship and ownership doctrines. Here, Plaintiff cited the Declaratory Judgment  
12 Act in support of the requested relief, but as demonstrated above, that does not  
13 remove this controversy from consideration of the Copyright Act.  
14  
15

16  
17 **3. Improper Motivation.**

18 Plaintiff’s litigation conduct demonstrates that *Plaintiff threatened and filed*  
19 *this lawsuit to coerce a settlement from Defendants.* Such misconduct demonstrates  
20 improper motivation and militates in favor of an award of fees. A finding of bad faith  
21 may be based on a plaintiff’s conduct that “suggests an intent to force Defendant to  
22 expend significant resources on litigation in order to coerce a settlement.” *Shame on*  
23 *You Prods., Inc. v. Banks*, 893 F.3d 661 (9th Cir. 2018). Bad faith, while not  
24 necessary to an award of fees, can be based on a plaintiff’s actions both in bringing  
25 the lawsuit and during the course of the litigation. *Marcus*, 2017 WL 5592470, at \*4.  
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1 In this case, Plaintiff’s improper motivation has been clear from the outset. For  
2 example, on January 9, 2023, Plaintiff’s counsel made the initial demand *on behalf*  
3 *of Tracey* (not Plaintiff), to “cease and desist” from making allegedly defamatory  
4 statements about *Tracey*. (KC Decl., ¶ 43 and Exh. 1.) There was absolutely no claim  
5 of copyright infringement. In fact, the demand was to “immediately remove” the  
6 allegedly defamatory statements and to “retract” them .  
7

9 Not content with Defendants’ response, *however*, on February 6, 2023  
10 Plaintiff’s counsel wrote again, this time on behalf of both Tracey and Plaintiff, now  
11 “with respect to any claims it may have against NoPixel for **copyright**  
12 **infringement.**” (KC Decl., ¶ 3 and Exh. 3.) Yet *it was clear that pursuing damages*  
13 *for alleged copyright claims was not Plaintiff’s motivation.* Instead, Plaintiff’s  
14 counsel threatened it “intends to bring any such viable [copyright] claims against  
15 NoPixel *if Mr. Tracey’s reasonable demands brought by way of our initial January*  
16 *9, 2023 correspondence are not met.*” In other words, *Plaintiff threatened to sue for*  
17 *copyright infringement to compel Defendants to retract an allegedly defamatory*  
18 *statement.* This “suggests an intent to force Defendant to expend significant  
19 resources on litigation in order to coerce a settlement.” *See Shame on You*, supra.  
20  
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23

24 When Defendants again declined, Plaintiff made good on its threat to sue.  
25 Only neither Plaintiff nor Tracey sued for alleged defamation. Instead, Plaintiff  
26 creatively styled its complaint as an action for “declaratory relief”, instead of  
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28

1 copyright infringement, because Plaintiff was aware it had no copyright registration.  
2 It manufactured a claim that it had an agreement with Defendants to “loan out” the  
3 services of Tracey to create copyrighted material that would be jointly owned  
4 between Plaintiff and Defendant.  
5

6  
7 Plaintiff then refused to dismiss the claim for two years until Defendants  
8 presented the instant motion for summary judgment and, when presented with the  
9 opportunity to create an issue of fact or provide any evidence it had a contract with  
10 Defendants, loaned out Tracey to work for Defendants, created a jointly owned work  
11 or that Tracey did not license the subject work to Defendants, Plaintiff admitted that  
12 none of their claims had merit by not even filing an opposition. In sum, Plaintiff  
13 forced Defendants to call Plaintiff’s bluff and incur over \$222,183.42 in fees (see  
14 below) before finally conceding and admitting it had no claim.  
15  
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17

18 **4. Awarding Attorneys’ Fees and Costs Would Deter Meritless**  
19 **Infringement Claims.**  
20

21 This factor is intended to deter opportunistic plaintiffs from bringing frivolous  
22 and unreasonable claims and to ensure that defendants are encouraged to protect  
23 their legitimate rights. *Scott v. Meyer*, No. CV 09-6076 ODW(RZX), 2010 WL  
24 2569286, at \*3 (C.D. Cal. June 21, 2010) (“Deterring non-meritorious lawsuits  
25 against defendants seen as having ‘deep pockets’ and compensating parties that must  
26 defend themselves against meritless claims are both laudable ends.”); *AF Holdings*  
27  
28

1 *LLC v. Navasca*, No. C12-2396 EMC, 2013 WL 3815677, at \*3 (N.D. Cal. July 22,  
2 2013) (“[T]here is a strong argument in favor of awarding fees as a deterrent, both  
3 with respect to [plaintiff] and other persons or entities that might contemplate a  
4 similar business model that is not intended to protect copyrighted work but instead  
5 designed to generate revenues through suits and coerced settlements.”). Awarding  
6 fees in cases like this is vital because it provides parties with “every incentive to  
7 keep fighting” against meritless infringement claims “no matter that attorney’s fees  
8 in a protracted suit might be as or more costly than a settlement.” *Kirtsaeng*, 579  
9 U.S. at 205.

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14 Thus, this factor also supports a fee award in this case, given that (i)  
15 circumstances demonstrate Plaintiff had an improper motivation for filing this  
16 lawsuit, (ii) Plaintiff has now admitted it had no evidence in support of its claims;  
17 **and** (iii) Defendants were forced to protect their rights against a meritless claim via  
18 summary judgment rather than capitulate to inappropriate settlement pressure and  
19 tactics.  
20

21  
22 In fact, as outlined in Defendant’s undisputed Motion for Summary Judgment  
23 and Statement of Facts, Plaintiff admitted it never communicated with Defendants  
24 nor had any agreement regarding a “joint work,” “joint authorship,” or “joint  
25 ownership.” Additionally, there is no factual dispute that Plaintiff’s employee,  
26 Tracey, signed Terms confirming that he would own the copyright in his  
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1 contributions while granting Defendants a non-exclusive, perpetual license to use the  
2 material. When these undisputed facts were presented, Plaintiff *failed* to oppose  
3 them or provide any evidence supporting its claims.  
4

5           Given that (a) it was undisputed there was no joint authorship or joint  
6 ownership, (b) Plaintiff owned the copyright and clearly granted Defendants a  
7 license to use it, *and* (c) Plaintiff failed to present or oppose any evidence disputing  
8 these facts, it is evident that Plaintiff's complaint and claims are frivolous,  
9 unreasonable, and asserted for an improper purpose. Simply, this matter should never  
10 have been brought before this Court.  
11  
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13           In such circumstances, only through an award of attorney fees in favor of  
14 Defendants can Plaintiff be deterred and Defendants compensated as a result of  
15 having to defend against frivolous and unreasonable claims up to and through the  
16 Motion for Summary Judgment stage. This includes, without limitation, having to  
17 defend against Plaintiff's Motion for Summary Judgment, which was immediately  
18 denied by this Court. In fact, had Plaintiff's claims and allegations had any merit,  
19 Plaintiff would have opposed Defendant's Motion for Summary Judgment, instead of  
20 finally rolling over after nearly two years of litigation and tacitly admitting its claims  
21 were frivolous, meritless and objectively unreasonable.  
22  
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24           This is precisely the type of conduct that this Court should deter; and  
25 Defendants should be compensated as a result of having to pursue a meritorious  
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1 defense to a patently meritless copyright claim. In that regard, the U.S. Supreme  
2 Court in both *Fogerty* and *Kirtsaeng* endorsed and approved the use of fee awards to  
3 incentivize a party, whether a defendant or plaintiff, to keep fighting against an  
4 unreasonable opposing party, noting that the “successful defense of a copyright  
5 infringement action may further the policies of the Copyright Act every bit as much  
6 as a successful prosecution of an infringement claim.” *Fogerty*, 510 U.S. at 527. The  
7 *Kirtsaeng* case is even more enlightening: When a litigant, whether plaintiff or  
8 defendant, **is clearly correct**, the likelihood that he will recover fees from the  
9 opposing (i.e. unreasonable) party gives him an incentive to litigate the case all the  
10 way to the end. *Kirtsaeng* 579 U.S. at 7 (emphasis added).  
11  
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15 As discussed above, Plaintiff has no reasonable claim against Defendants, and  
16 it never should have brought suit against them in the first instance. But now, having  
17 done so, Plaintiff should be charged for the full amount of cost and expense it has  
18 forced Defendants to bear. Defendants should be fully compensated to deter Plaintiff  
19 from pursuing similar overaggressive and frivolous claims. This is especially true  
20 given that Plaintiff was informed of these facts at every stage of this dispute and  
21 throughout the litigation, with these points repeatedly clarified to Plaintiff. Failing to  
22 award fees to the prevailing defendant here will only encourage the filing of even  
23 more frivolous cases by Plaintiff if Plaintiff risks no downside by filing them. In any  
24 case, the requested award is the only way to compensate Defendants for having to  
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1 defend against patently frivolous claims (thereby removing the need to file a  
2 Malicious Prosecution action).

3  
4 **VI. DEFENDANTS' ATTORNEYS' FEES AND COSTS ARE**  
5 **REASONABLE**  
6

7 **A. Defendants' Attorneys' Rates Are Reasonable**

8 District courts use the lodestar method to calculate an award for attorneys'  
9 fees. *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001). This  
10 method takes the number of hours reasonably expended on the litigation and  
11 multiplies it by a reasonable hourly rate. *Morales v. City of San Rafael*, 96 F.3d 359,  
12 363-64 (9th Cir. 1996). The prevailing market rate in the community is indicative of  
13 an attorney's reasonable hourly rate. *Blum v. Stevenson*, 465 U.S. 886, 895-96 n.11  
14 (1984) (the requested rates must be "in line with those prevailing in the community  
15 for similar services by lawyers of reasonably comparable skill, experience, and  
16 reputation").  
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20 "There is a strong presumption that the lodestar figure represents a reasonable  
21 fee. 'Only in rare instances should the lodestar figure be adjusted on the basis of  
22 other considerations.'" *Morales*, 96 F.3d at 363 n.8 (citing *Harris v. Marhoefer*, 24  
23 F.3d 16, 18 (9th Cir. 1994) and *Oviatt v. Pearce*, 954 F.2d 1470, 1482 (9th Cir.  
24 1992)).  
25

26  
27 Finally, although a prevailing party must provide evidence to support the  
28 hours spent on litigating meritless claims, "[t]he party opposing the fee application

1 has a burden of rebuttal that requires submission of evidence to the district court  
2 challenging the accuracy and reasonableness of the hours charged or the facts  
3 asserted by the prevailing party in its submitted affidavits.” *Gates v. Deukmejian*,  
4 987 F.2d 1392, 1397-98 (9th Cir. 1992). The fee applicant’s records need not be  
5 extraordinarily detailed but should identify the general subject matter of the claimed  
6 time expenditures. See *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12.  
7

9 Defendants’ counsel consistently staffed this matter with the original team  
10 since day one of pre-litigation, maintaining continuity and efficiency throughout the  
11 litigation. The legal team at all times comprised of partner, Keith Cooper and  
12 associate Katayoon Iravani, with Larry Zerner as the lead litigator. (KC Decl., ¶ 8.)  
13 This small but dedicated team handled all aspects of the defense from start to finish,  
14 ensuring cost-effective management despite the demands and complexity of the case.  
15

17 Mr. Cooper has 30 years of experience in intellectual property and litigation,  
18 having previously served as a partner at Morrison Cooper LLP and Morrison  
19 Rothman LLP, and currently as a partner at Cooper & Iravani, LLP. Mr. Cooper is  
20 admitted to practice in California. Mr. Cooper has been involved in this matter since  
21 its inception in January 2023, initially overseeing pre-litigation efforts and later  
22 working alongside Mr. Zerner and Ms. Iravani when the case phased into litigation.  
23 Mr. Cooper’s average billing rate for this matter was \$525 per hour, and he did not  
24 bill for many of his contributions, underscoring the firm’s commitment to efficient  
25 case management.  
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1 Defendants' lead counsel, Mr. Zerner, is a seasoned attorney with 33 years of  
2 experience in entertainment and intellectual property litigation, admitted to practice  
3 in California. He serves as Of Counsel to Cooper & Iravani, LLP, and formerly with  
4 the firms Morrison Cooper LLP and Morrison Rothman LLP. His expertise and  
5 experience have been invaluable to the defense of this matter, as he provided  
6 strategic oversight on all litigation phases. Mr. Zerner applied his standard billing  
7 rate of \$525 per hour.  
8

9  
10 Katayoon Iravani, currently a third-year associate and a 2019 graduate of  
11 Loyola Law School, was previously with Morrison Cooper LLP (and Morrison  
12 Rothman LLP), and is now with Cooper & Iravani, LLP. Ms. Iravani has managed  
13 this matter from the initial response in pre-litigation discussions with Plaintiff's  
14 counsel through all stages of litigation, including this fee motion. Billing at an  
15 average rate of \$425 per hour, Ms. Iravani has been actively involved and integral in  
16 defending against Plaintiff's claims, preparing motions, handling discovery, and  
17 correspondence throughout the case.  
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21 **B. Counsel for Defendant Spent Reasonable Amount Of Time**  
22 **Litigating The Merits Of Plaintiff's Action, Considering How Much**  
23 **Work Was Involved.**

24 There is no question that Defendants' counsel expended a significant amount  
25 of time defending against Plaintiff's claims from January 2023 (when Plaintiff first  
26 asserted its claims) through October 24, 2024 (when the Court granted and entered  
27  
28

1 the MSJ). Over the duration of this period, Defendants’ counsel billed the following  
2 aggregate hours:  
3

<b>Attorney/Staff</b>	<b>Hours</b>
Larry Zerner (Lead Litigator)	156.9
Keith L. Cooper (Partner)	64.7
Katayoon Iravani (Associate)	123.6
Kylie Sanders (Paralegal)	16.7
Ryan O’Connor (Paralegal)	0.7
Conor McClelland (Paralegal)	0.5
Wileen Leu (Senior Counsel)	0.3
Sean Ulrich (Senior Counsel)	0.4
<b>Total Hours</b>	<b>363.8</b>

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14 Based on the foregoing, Defendants respectfully request that the Court award  
15 Defendants the sum of \$222,183.42 on account of their attorneys’ fees incurred  
16 through October 31, 2024, after the Court granted Defendants’ MSJ.  
17

18 **C. Defendants Requests An Award of Allowable Costs**

19 Defendants also seek \$43,917.24 in allowable costs incurred in this litigation.  
20 The Court has the discretion to award litigation costs to Defendant pursuant to 17  
21 U.S.C. §505. These costs, which include deposition reporting and transcripts,  
22 parking, PACER charges, FedEx charges associated with service of court filings,  
23 expert witness retention and supplemental costs, and FedEx charges associated with  
24 subpoenas also are reasonable and appropriate. (KC Decl., ¶ 19 and Exh. 5.)  
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28

1                    **D. Defendants are Also Entitled To Recover Fees And Costs Incurred**  
2                    **In Connection With This Motion**

3                    “[T]ime spent in establishing the entitlement to and amount of the fee is  
4                    compensable.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008)  
5                    (citing *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659-660 (9th Cir. 1985)).

6                    Defendants incurred approximately \$10,395.00 in additional fees in connection with  
7                    attempting to negotiate a settlement with Plaintiff to avoid this motion, as well as  
8                    researching, drafting and revising this fee motion, the supporting declarations and  
9                    supporting exhibits. (KC Decl. ¶ 20.)

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11  
12                    **VII. CONCLUSION**

13                    For all the reasons set forth above, Defendant respectfully requests that the Court  
14                    award Defendants their reasonable attorneys’ fees and costs in the amount of  
15                    **\$222,183.42**, plus **\$10,395.00** in fees they incurred in connection with this motion, as  
16                    well as any additional fees incurred in connection with any supplemental briefing or  
17                    hearing relating to this fee motion.  
18

19  
20  
21                    Dated: November 7, 2024

Respectfully submitted,

22                    **ZERNER LAW**

23  
24                    By: /s/Larry Zerner

Larry Zerner

25                    Attorneys for Defendants Koil Content  
26                    Creation Pty. Ltd. and Mitchell Clout