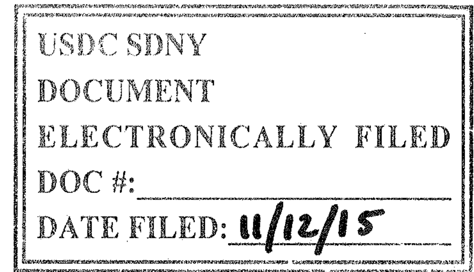

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, INC., et al.,

Plaintiffs,

-against-

MP3TUNES, LLC, et al.,

Defendants.

07cv9931

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

The record company and music publisher Plaintiffs (the "Label Plaintiffs" and "Publisher Plaintiffs") move for an award of attorneys' fees and non-taxable costs under the Copyright Act against Defendants MP3tunes, LLC ("MP3tunes") and Michael Robertson ("Robertson"). For the following reasons, Plaintiffs' motion is granted in part.

BACKGROUND

On November 20, 2014, Plaintiffs moved for an award of $7,195,248.54 in attorneys' fees and costs under the Copyright Act. (See ECF No. 654.) By Memorandum & Order dated April 3, 2015, this Court granted Plaintiffs' motion in part (hereinafter "April 3 Memorandum & Order"). (See ECF. No. 689.) This Court held that the fee shifting provisions of the Copyright Act supported an award of fees in view of: (1) the jury's finding of Robertson's willful copyright infringement; (2) the objectively unreasonable positions taken by Robertson in the course of the litigation, including his denial of personal jurisdiction, and his attempt to apply the automatic stay to himself in the MP3Tunes Bankruptcy; and (3) his unreasonable litigation conduct, including his inducement of fraudulent testimony from MP3tunes employees. (See ECF No. 689.)

In its April 3 Memorandum & Order, and at a subsequent April 9, 2015 conference (see ECF No. 696), this Court encouraged the parties to confer in good faith to stipulate to an amount of attorneys' fees and costs. Because the parties could not agree, further briefing and the submission of contemporaneous billing records ensued. (See ECF No. 700.)

Plaintiffs now seek attorneys' fees and costs in the amount of $4,072,841.17, representing approximately one-third of the $12,000,000 in attorneys' fees expended by Plaintiffs in this Litigation. Specifically, the Label Plaintiffs seek $2,437,776.66 in attorneys' fees and $537,817.16 in non-taxable costs. The Publisher Plaintiffs seek $929,759.06 in attorneys' fees and $167,488.29 in non-taxable costs.

LEGAL STANDARD

In determining the amount of a fee award, district courts are to calculate the "presumptively reasonable fee." Simmons v. N.Y. City Transit Auth., 575 F.3d 170, 172 (2d Cir. 2009). The starting point for determining the presumptive reasonable fee is the "lodestar" amount, which is "the product of a reasonable hourly rate and the reasonable number of hours required by the case." Millea v. Metro-North R.R. Co., 658 F.3d 154, 166 (2d Cir. 2011). In determining what a reasonable client would pay, this Court considers the twelve factors outlined in Johnson v. Ga. Highway Exp., Inc., 488 F. 2d 714, 716 (5th Cir. 1974), including, inter alia: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the attorney's customary hourly rate; (5) the amount involved in the case and the results obtained; (6) the experience, reputation, and ability of the attorneys; and (7) awards in similar cases. See also Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 493 F. 3d 110, 186 n.3 (2d Cir. 2007).

As the fee applicant, Plaintiffs bear the "burden of documenting the hours reasonably spent by counsel, and the reasonableness of the hourly rates claimed." Allende v. Unitech Design, Inc., 783 F. Supp. 2d 509, 512 (S.D.N.Y. 2011).

DISCUSSION

Having addressed whether the Copyright Act warrants an award of attorneys' fees and costs in the April 3 Memorandum & Order, this Court now fixes an amount. In considering the appropriate award, this Court focuses first on the various challenges Robertson raises to discrete aspects of Plaintiffs' request, and second on the extent to which Plaintiffs' request is consistent with the Copyright Act.

A. Robertson's Objections to Specific Entries Billed by Plaintiffs

In 424 pages of opposition papers—including a memorandum of law, declaration, and exhibits—Robertson rehashes arguments already addressed in the April 3 Memorandum & Order, objects to the entirety of Plaintiffs' fee application, and concedes only that "at the very most" Publisher Plaintiffs "should be awarded $200,000 in fees[.]" (Sacks Decl. ¶109.) Robertson contends that Plaintiffs' fee application is excessive and seeks fees not directly related to the April 3 Memorandum & Order. Robertson exhaustively parses Plaintiffs' fee application, seeking to identify fees outside the scope of the three specific "areas of litigation misconduct found by [this] Court[:]" (i) relitigation of the issue of personal jurisdiction, (ii) denial of control over MP3tunes, and (iii) attempt to extend the bankruptcy stay to him personally." (Sacks Decl. ¶¶7, 12-34).

To support his argument, Robertson contends that this Court must tie any award directly to those fees incurred as a "direct result" of the misconduct. See Matthew Bender & Co. v. W. Pub. Co., 240 F. 3d 116, 126 (2d Cir. 2001). Robertson's argument is misplaced. This Court awarded fees in its April 3 Memorandum & Order based, not only on Robertson's litigation misconduct and the unreasonable arguments he advanced, but also on the jury's finding of willful copyright infringement.

This Court declines to engage Robertson in a line-by-line review of Plaintiffs' billing entries over the last eight years to determine whether the time expended directly ties to

the unreasonable positions or bad faith conduct outlined in the April 3 Memorandum & Order. Robertson's reading of this Court's prior orders is cramped. The April 3 Memorandum & Order addressed the broader question of whether an award was warranted and included several examples of Robertson's litigation misconduct and unreasonable positions.

This Court has conducted a careful review of Plaintiffs' billing records. While Plaintiffs incurred in excess of $12 million in fees, they have now trimmed their original $7.1 million fee application to $4.07 million. Plaintiffs have pruned their billing records to limit their application to fees incurred litigating Robertson's willful infringement and defending against his unreasonable litigation positions and misconduct, as well as those fees "inextricably intertwined" with that conduct. (See, e.g., Scibilia Decl. Ex. K; Bart Decl. Exs. 1-19); see Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1183 (2d Cir. 1996). Plaintiffs do not seek fees incurred in litigating defenses to Robertson's positions that this Court found to be objectively reasonable, including Robertson's theories regarding promotional downloads and legal questions surrounding the scope of the DCMA safe harbors. (Bart Decl. ¶2.)

B. Vague, Duplicative, and Block-Billed Entries

Robertson contends that at least $1,425,743.25 of the fees incurred by Label Plaintiffs and $531,602.81 of the fees incurred by Publisher Plaintiffs are supported by vague narratives, block billing, excessive billing, and/or billing for clerical tasks.[1] (Sacks Decl. ¶¶94-103.) To buttress this claim, Robertson submits a compilation of all allegedly improperly billed time entries. (Sacks Decl. Exs. Q, R.)

Some of Plaintiffs' entries lack the detail necessary for this Court to determine the reasonableness of the time spent. A review of Andrew Bart's time entries—Label Plaintiffs' lead counsel—is illustrative: Bart's time records regularly employ vague narrative descriptions

[1] Robertson also objects to Plaintiffs' fee application on the basis that Publishing Plaintiffs have only submitted copies of their bills, not their underlying computer records. This is a distinction without a difference. The bills submitted by Publishing Plaintiffs specify "for each attorney, the date, the hours expended, and the nature of the work done." See New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983).

such as "Amended Complaint," "Deposition Preparation," "Document Review," "Emails," "Motion Papers," or "Letter to the Court." (See Sacks Decl. Ex. Q.) A review of Publisher Plaintiffs' lead counsel, Frank Scibilia, reveals similarly vague narrative descriptions such as "work on outlines" and "prepare for argument." (See Scibilia Decl. Ex. K.) See Kirsch v. Fleet Street, Ltd., 148 F. 3d 149, 172 (2d Cir. 1998) (upholding a reduction of 20% for entries such as "letter to court," "staff conference," or "work on motion"). A modest reduction to account for vague entries is warranted.

Further, Plaintiffs' time entries reflect block billing, i.e., many time entries list multiple tasks in the "narrative" section, without isolating particular hours assigned to each task. (See Scibilia Decl. Ex. K; Bart Decl. Exs. 10-19.) Block billing is disfavored because such a practice impedes this Court's ability to assess whether the time expended on any given task was reasonable. See Beastie Boys v. Monster Energy Co., --- F. Supp. 3d ---, 2015 WL 3823924, at *18 (S.D.N.Y. June 15, 2015); Ramires v. Benares Indian Rest. LLC, No. 14 Civ. 7423 (JMF), 2015 WL 926008, at *2 (S.D.N.Y. Mar. 4, 2015). Further, some of Plaintiffs' block billed entries contain large amounts of time, in many cases over eight hours, which may be problematic. Cf. Abdell v. City of New York, No. 05 Civ. 8453 (RJS), 2015 WL 898974, at *4 (S.D.N.Y. Mar. 2, 2015) (finding block billing acceptable where it was "for temporally short entries combining related tasks").

However, Plaintiffs' block billed entries contain enough detail so as to afford confidence that the time billed was productively spent, "even if it is impossible to reconstruct the precise amounts of time allocable to each specific task listed in the block entry." Beastie Boys, 2015 WL 3823924, at *18 (reducing the fee award "marginally" where the commingling of activities did not impede the court's efforts to evaluate the reasonableness of the listed activities). A minimal reduction to account for Plaintiffs' practice of block billing is warranted.

This Court is obliged to exclude attorney time that was not "reasonably expended" from any fee award. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). However, Plaintiffs have made a "good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary[.]" Hensley, 461 U.S. at 343. Robertson contends that as many as five attorneys from the Label and Publisher Plaintiffs attended the three week trial. While that may be true, Label Plaintiffs' fee application includes, at most, fees for the two lead partners, one associate, and one non-attorney. (See Bart Decl. Ex. 17.) And Publisher Plaintiffs' fee application does not seek any fees for attending trial. (See Scibilia Decl. Ex. K, pp. 31-38.) There is no requirement that only one attorney bill for trial time. Instead, on a fee-shifting application, the test is whether the plaintiff "spen[t] the minimum necessary to litigate the case effectively." Simmons, 575 F.3d at 174 (citation omitted); see also Beastie Boys, 2015 WL 3823924, at *17 ("[T]he governing test of reasonableness is objective; it is not dictated by a particular client's subjective desires or tolerance for spending."). This Court finds that the professional time included in this amended fee application was reasonably incurred.

C. Attorney Billing Rates

Label Plaintiffs' attorneys billed at rates ranging from $575 to $720 per hour for partners, and $400 to $565 per hour for associates. Robertson contends that some of Label Plaintiffs' attorneys' hourly billing rates are unreasonably high and should be adjusted downward.

In particular, Robertson singles out Andrew Bart's $720 per hour and Steven B. Fabrizio's $698 per hour[2] rates as excessive. While these rates are at the high end of what judges in this District have awarded for experienced partners in copyright cases, they are within the range of what is considered reasonable. See, e.g., Regulatory Fundamentals Group LLC v. Governance Risk Mgmt. Compliance, LLC, 13 Civ. 2493 (KBF), 2014 WL 4792082, at *2

[2] Robertson suggests that Platzer bills at $698 per hour, but Plaintiffs' declaration cites his billing rate at the much lower $590 per hour. (See Bart Decl. Ex. 23.)

(S.D.N.Y. Sept. 24, 2014) ("In recent years, New York district courts have approved rates for experienced law firm partners in the range of $500 to $800 per hour."); Broad. Music, Inc. v. Pamdh Enters., Inc., No. 13 Civ. 2255 (KMW), 2014 WL 2781846, *7 (S.D.N.Y. June 19, 2014) (collecting cases finding $400 to $735 per hour as reasonable rates for partners).

However, many associate attorneys for Label Plaintiffs billed at hourly rates in excess of $450 per hour—the high end of rates typically approved in this District. (See Bart Decl. Ex. 27 (noting that J. Douglas Wilson billed at $507 per hour); see also Bart Decl. Exs. 28, 29 (noting that, inter alia, Joseph McFadden billed at $565 per hour).) See, e.g., Genger v. Genger, No. 14 Civ. 5683 (KBF), 2015 WL 1011718, at *2 (S.D.N.Y. Mar. 9, 2015) ("New York district courts have . . . recently approved rates for law firm associates in the range of $200 to $450 per hour."); Dweck v. Amadi, 10 Civ. 2577(RMB) (HBP), 2012 WL 3020029, at *4 & n. 5 (S.D.N.Y. July 6, 2012) (collecting cases approving rates between $180 and $440 per hour for associates).

Further, Label Plaintiffs employed non-attorney personnel, some of whom billed at hourly rates in excess of $200 per hour—the high end of rates typically approved in this District. (See Bart Decl. Ex. 30 (noting that Jeffrey K. Phillips, Judy S. Lao, Cheryl L. Olson, and Mark R. Scholl billed at $225 per hour.) See Broad. Music, Inc., 2014 WL 2781846, at *7 (collecting cases); see also M. Lady LLC v. AJI, Inc., No. 06 Civ. 0194 (HBP), 2009 WL 1150279, at *7 (S.D.N.Y. Apr. 29, 2009) (collecting cases awarding between $50 and $180 per hour for paralegals). A modest reduction to the fees sought is warranted in light of the rates charged by Label Plaintiffs' associates and non-attorney personnel.

Publisher Plaintiffs' counsel billed in the range of $517.50 to $562 per hour for partners and of counsel, and $315 to $397 for associates. The rates charged by Publisher Plaintiffs' counsel are within the ranges of rates typically approved by courts in this District.

D. The Goals of the Copyright Act

The "touchstone" of attorneys' fees under Section 505 of the Copyright Act is whether imposition of such fees will further the interests of the Copyright Act, "i.e., by encouraging the raising of objectively reasonable claims and defenses, which may serve not only to deter infringement but also to ensure 'that the boundaries of copyright law [are] demarcated as clearly as possible' in order to maximize the public exposure to valuable works." Mitek Holdings, Inc. v. Arce Eng'g Co., 198 F.3d 840, 842–43 (11th Cir. 1999) (quoting Fogerty v. Fantasy, 510 U.S. 517, 526–27 (1994)).

To advance the goals of the Copyright Act, the award this Court imposes should be sufficient, but not greater than necessary, to deter future would-be infringers. Robertson is already accountable for a judgment in excess of $12 million—a substantial price tag for his infringements. Nevertheless, a fee award to Plaintiffs advances the goals of compensation and deterrence in the wake of Robertson's willful copyright infringements, as established by the jury. It also accounts for Robertson's unreasonable litigation positions and misconduct. Additionally, the goal of compensation is met by an award to Plaintiffs. Plaintiffs spent more than $12 million to obtain a judgment of $12,241,531. (See April 3 Memorandum & Order at 6, ECF No. 689.)

At the same time, this Court is mindful that Section 505 of the Copyright Act is not intended to provide a windfall to Plaintiffs. See Crescent Publ'g Grp., Inc., v. Playboy Enters., Inc., 246 F. 3d 142, 151 (2d Cir. 2001) ("[I]n no event should the fees awarded amount to a windfall for the prevailing party."). This Court previously cautioned in its April 3 Memorandum & Order that it would award Plaintiffs "a fraction" of the fees initially sought. (April 3 Memorandum & Order at 6.) And as this Court has observed on numerous occasions, "many of the Plaintiffs' claims were just too big to succeed." Capitol Records, Inc., --- F. Supp. 3d ---, 07 Civ. 9931 (WHP), 2014 WL 4851719, at *1 (S.D.N.Y. Sept. 29, 2014). At trial, Plaintiffs attempted to prove Robertson's infringement of 2,800 copyrights. Ultimately, the jury

found Robertson liable for infringing only 550 copyrights. Under that measure, Plaintiffs "prevailed" on less than 20% of the claims they endeavored to prove at trial.

Finally, "[a] court that awards fees to a defendant must take into account the financial circumstances of the plaintiff" when determining how much to award. Polsby v. St. Martin's Press, No. 97 Civ. 690 (MBM), 2001 WL 180124, at *1 (S.D.N.Y. Feb. 22, 2001) ("This principle has been applied in cases under the Copyright Act."); see also Sassower v. Field, 973 F.2d 75, 81 (2d Cir. 1992). Robertson claims he is worth less than $700,000. But, as this Court has previously noted, that amount is "highly machined" and "carefully crafted" to exclude various and substantial assets located outside of the Southern District of New York. (See ECF No. 720, Order permitting Plaintiffs to register the Amended Judgment in the Southern District of California.) And Robertson continues to thwart Plaintiffs' attempts to glean more information through post-trial discovery by objecting to all discovery requests and interrogatories. (See Bart Decl. ¶23.) The state of Robertson's finances remains opaque, to say the least.

E. Aggregate Fee Reduction

This Court finds that an aggregate reduction of Plaintiffs' fee application is warranted. "It is common practice in this Circuit to reduce a fee award by an across-the-board percentage where a precise hour-for-hour reduction would be unwieldy or potentially inaccurate." Beastie Boys, 2015 WL 3823924 at *22 (citation omitted); see also Kahlil v. Original Old Homestead Rest., 657 F. Supp. 2d 470, 476 (S.D.N.Y. 2009) ("It is well established that across-the-board reductions are appropriate when billing records are voluminous and numerous billing entries are in dispute.") (citation omitted). Fee reductions up to 30% are common in this District. See, e.g., Melodrama Publ'g, LLC v. Santiago, No. 12 Civ. 7830 (JSR) (FM), 2015 WL 2380521, at *2 ("Across-the-board reductions in the range of 15% to 30% are appropriate when block billing is employed."); De La Paz v. Rubin & Rothman, LLC, No. 11

Civ. 9625 (ER), 2013 WL 6184425, at *6 (S.D.N.Y. Nov. 25, 2013) (reducing fees by 30% to account for vague and excessive entries).

In consideration of the Copyright Act's goals enumerated above, and to account for vague and block billed time entries, as well as Label Plaintiffs' billing rates for associates and non-attorney personnel, this Court finds that a 20% reduction is warranted for Label Plaintiffs and a 15% reduction is warranted for Publisher Plaintiffs. A 20% reduction of Label Plaintiffs' fees equates to $1,950,221.33 in remaining fees. A 15% reduction of Publisher Plaintiffs' fees equates to $790,295.20 in remaining fees. Combined, Plaintiffs are entitled to fees totaling $2,740,516.53.

F. Costs

Plaintiffs seek to recover a portion of their non-taxable costs, i.e., costs not recoverable under Federal Rule of Civil Procedure 54 and enumerated in 28 U.S.C. §1920 to which they are entitled as a matter of law.[3] Specifically, Label Plaintiffs seek $537,817.16, and Publisher Plaintiffs seek $167,488.29 in expenses related to inter alia, electronic discovery, trial support, travel and airfare, electronic research, rebuttal expert fees, and other consulting fees. (Scibilia Decl. ¶73; Bart Decl. ¶¶21, 22.)

Although Plaintiffs may recover "full costs" under Section 505 of the Copyright Act, some courts in this District have taken the view that recoverable costs are limited to those enumerated in 28 U.S.C. §1920. See, e.g., Nature's Enterprises, Inc., v. Pearson, 08 Civ. 8549, 2010 WL 447377, at *10 (S.D.N.Y. Feb. 9, 2010) (JGK) ("the weight of authority in this Circuit limits the recovery of costs" to those items that fall under 28 U.S.C. §1920); United States Media Corp., Inc. v. Edde Entertainment, Inc., 94 Civ. 4849 (MHD), 1999 WL 498216, at *7 (S.D.N.Y. July 14, 1999) ("The weight of authority indicates that the 'full costs' referred to in the

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[3] Plaintiffs seek their taxable costs under Fed. R. Civ. P. 54 and Local Rule 54.1 by separate submission. (See Scibilia Decl. ¶72.)

Copyright Act are nothing more than the costs allowed under 28 U.S.C. §1920 . . . . We adhere to this consensus.").

However, as this Court previously held, Plaintiffs may recover "reasonable out-of-pocket" expenses incurred during litigation as part of their attorneys' fee award. See Berry v. Deutsche Bank Trust Co. Americas, 632 F. Supp. 2d 300, 306 (S.D.N.Y. 2009) (attorneys' fee awards include "those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients"); see also Arthur Kaplan Co., Inc. v. Pan Aria Int'l, Inc., 96 Civ. 7973 (HB), 1999 WL 253646, at *3 (S.D.N.Y. Apr. 29, 1999) (awarding costs "reasonable and necessary to the litigation" despite not being specifically listed in 28 U.S.C. §1920).

Accordingly, Label Plaintiffs are entitled to $105,288.33 in costs for photocopying, legal and database research, outside duplication and printing services, and travel. (Bart Decl. Ex. 31.) Similarly, Publisher Plaintiffs are entitled to $142,763.29 in costs for internal printing, copying and scanning, outside duplication services, legal research, travel, and electronic discovery. (Scibilia Decl. ¶73.) Indeed, these are the "types of routine costs awarded to previous parties in trademark and copyright infringement actions." Gakm Resources LLC, et al. v. Jaylyn Sales Inc., 08 Civ. 6030 (GEL), 2009 WL 2150891, at *10 (S.D.N.Y. July 20, 2009). This Court declines to exercise its discretion to award the remainder of Plaintiffs' costs relating to rebuttal expert witnesses, consulting, and other professional services.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for partial attorneys' fees and costs is granted in part. Plaintiffs are awarded $2,740,516.53 in fees and $248,051.62 in non-taxable costs. Specifically, Label Plaintiffs are awarded $1,950,221.33 in fees and $105,288.33 in non-taxable costs. Publisher Plaintiffs are awarded $790,295.20 in fees and $142,763.29 in non-taxable costs.

The Clerk of Court is directed to terminate the motions pending at ECF Nos. 654 and 701.

Dated: November 12, 2015
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

All Counsel of Record (via ECF).