INDEX OF APPENDICES

B. Ninth Circuit Memorandum, *Johnson v. STORIX, INC.*, No. 18-56106 .....1a

C. Ninth Circuit Order Denying Petition for Rehearing 4a

D. District Court Order Awarding Attorneys' Fees on Remand.....5a

E. District Court Second Amended Judgment 42a

F. Ninth Circuit Memorandum, *Johnson v. STORIX, INC.*, Case No. 16-55439 .....45a

A. Ninth Circuit Memorandum, *Johnson v. STORIX, INC.*, No. 18-56106

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY J. JOHNSON, Plaintiff-counter defendant-Appellant,	No. 18-56106 D.C. No. 3:14-cv-01873-H-BLM
v.	MEMORANDUM*
STORIX, INC., a California Corporation, Defendant-Counter-claimant-Appellee.	FILED FEB 5 2020 MOLLY C. DWYER, CLERK

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Submitted February 5, 2020**

Before: FARRIS, D.W. NELSON, and SILVERMAN, Circuit Judges.

Anthony Johnson ("Johnson") appeals pro se the district court's judgment awarding $407,778.00 in attorneys' fees to Storix, Inc. ("Storix") on remand from this court's decision in *Johnson v. Storix, Inc.*, No. 16-55439, 716 Fed. App'x. 628 (9th Cir. 2017) ("*Johnson I*").[1]

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's award of attorneys' fees for an abuse of discretion. *Maljack Productions v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 (9th Cir. 1996). We affirm.

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] The prior panel declined this appeal as a comeback.

Johnson I summarizes in detail the factual and procedural background of this case. In *Johnson I*, a prior panel of this court held that while the district court did not abuse its discretion in choosing to award fees to Storix, the amount of the award was unreasonable "[b]ecause Johnson's claims were neither unreasonable nor frivolous," and because "Johnson, who is now pro se, is an individual plaintiff, rather than another company." 716 Fed. App'x. at 630-31. This court therefore remanded this matter to the district court to "reconsider the amount" of the attorneys' fee award. *Id.* at 631.

On remand, the district court reduced its initial fee award by 25%, awarding Storix $407,778.00 in attorneys' fees. The district court also awarded Storix post-judgment interest from the date of the original judgment.

Given the scope of this court's remand order, we conclude the district court did not err in holding that it was not required to reexamine its original decision to award attorneys' fees to Storix under the Copyright Act, 17 U.S.C. § 505. *See Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1172 (9th Cir. 2006) (explaining that "a district court is limited by this court's remand in situations where the scope of the remand is clear").

The district court did not abuse its discretion in making a 25% reduction of the total fee award on remand. In accordance with this court's instructions in *Johnson I*, the district court properly considered the objective reasonableness of Johnson's claims and his pro se status, and adequately explained why any further adjustment to Storix's lodestar amount was not warranted. *Hensley v. Eckerhart*,

461 U.S. 424, 437 (1983) (district court must provide a concise but clear explanation of its reasons for the fee award).

The district court also did not abuse its discretion in awarding post-judgment interest from the date of the original judgment under 28 U.S.C. § 1961 because this court affirmed the district court's decision to award fees and remanded only as to the amount awarded. *See Perkins v. Standard Oil Co. of Cal.*, 487 F.2d 672, 676 (9th Cir. 1973) (holding that "[w]here a single item such as attorneys' fees is reduced on appeal, the district court's determination should be viewed as correct to the extent it was permitted to stand, and interest on a judgment thus partially affirmed should be computed from the date of its initial entry").

AFFIRMED.

B. Ninth Circuit Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY J. JOHNSON,
Plaintiff-counter defendant-Appellant

v.

STORIX, INC., a California Corporation,
Defendant- counter-claimant-Appellee.

No. 18-56106
D.C. No. 3:14-cv-01873-H-BLM
Southern District of
California, San Diego

ORDER

FILED FEB 21 2020
MOLLY C.
DWYER, CLERK

Before: FARRIS, D.W. NELSON, and SILVERMAN, Circuit Judges.

Appellant's Petition for Panel Rehearing filed on February 11, 2020, is hereby **DENIED**.

C. District Court Order Awarding Attorneys' Fees on Remand

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, Plaintiff, v. STORIX, INC., a California corporation, Defendant.	Case No.: 3:14-cv-01873-H-BLM **ORDER AWARDING ATTORNEYS' FEES ON REMAND** [Doc. No. 285.]

On November 16, 2016, after a jury trial, the Court entered judgment in favor of Defendant Storix, Inc. ("Storix") and against Plaintiff Anthony Johnson ("Johnson") on Johnson's claim of copyright infringement, and awarded Storix attorneys' fees. (Doc. No. 246.) On December 19, 2017, the United States Court of Appeals for the Ninth Circuit affirmed the jury's verdict on liability, as well as the Court's decision to award Storix attorneys' fees. Johnson v. Storix, Inc., 716 F. App'x 628, 631 (9th Cir. 2017), cert. pet. filed, No. 17-1503 (Apr. 25, 2018). However, the Ninth Circuit held that the fees awarded were "unreasonable," and remanded with instructions for the Court "to reconsider the amount." Id. at 632.

After receiving the Ninth Circuit's mandate, (Doc. No. 283), the Court ordered the parties to submit supplemental briefing on the amount of attorneys' fees to be awarded to Storix. (Doc. No. 284.) After receiving and reviewing that briefing, (see Doc. Nos. 285, 288, 289), the Court held a hearing on the matter on August 6, 2018. Johnson appeared on his own behalf, while Storix was represented

by Paul A. Tyrell and Sean M. Sullivan. The Court now turns to the sole remaining issue on remand: the amount of reasonable attorneys' fees to be awarded to Storix.

Background

The parties went to trial to determine whether Johnson—Storix's former CEO and majority shareholder—transferred his copyright in a software program called SBAdmin to Storix in 2003 at the time of Storix's incorporation. The jury found that "Johnson transferred ownership of all pre-incorporation copyrights, including SBAdmin Version 1.3, in writing from himself to Storix[.]" (Doc. No. 246.)

I. The Court's Prior Fee Orders

On December 15, 2015, a jury rendered a special verdict in favor of Storix on each of Johnson's causes of action. (Doc. No. 154.) Storix then filed a motion seeking $1,078,232.75 in attorneys' fees and $236,943.96 in nontaxable costs pursuant to 17 U.S.C. § 505. (Doc. No. 165.) After receiving full briefing on the motion, the Court held a fees hearing on February 23, 2016. (Doc. No. 192.) Thereafter, the parties engaged in unsuccessful mediation. (Doc. Nos. 202, 204, 213.)

On June 16, 2016, the Supreme Court issued an opinion clarifying the standard for awarding fees under the Copyright Act. See Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979 (2016). The Court then ordered the parties to file supplemental briefing addressing Kirtsaeng's impact on Storix's fees motion. (Doc. No. 215.) Pursuant to the Court's instructions, the parties each filed two supplemental memoranda. (Doc. Nos. 217, 218, 223, 224.) On August 15, 2016, the Court held a second hearing on Storix's fee motion. (Doc. No. 229.)

On August 17, 2016, the Court granted Storix's fee request in part and denied it in part. (Doc. No. 230.) In accordance with Kirtsaeng, the Court considered "Johnson's motivations, the reasonableness of [his] positions, the degree of . . . Storix's success, the need to advance considerations of compensation and deterrence, and the frivolousness of . . . Johnson's litigation positions and tactics." (Id. at 4.) With respect to Johnson's motivations in bringing this suit, the Court noted that "Johnson took a number of actions demonstrating that his motivation was not simply to win damages for alleged copyright infringement . . . but also to wrest control of [Storix] from its majority shareholders and to force the company to 'close its doors.'" (Id. at 5–6 (citation omitted).) Specifically, the Court recounted an email Johnson sent to several Storix directors and employees entitled "Buckle up boys!" where Johnson stated:

> That means, when I win the very near copyright decision, which we all know I will, the company will be paying back all my legal expenses. And you will be paying the company back, for mine and its expenses. Here's your one option. Get the f[...] out. Give your stock back to the company, resign your board seat, terminate your employment. Leave with just what you gave me. Only then your name will be removed from the derivative[ ]action, giving you some hope of keeping your homes and perhaps finding other jobs. But once this is filed, all options are off the table. The damages I will be granted in the copyright case will transfer from the company to YOU.

(Doc. No. 66-1, Huffman Decl. Ex. A, at 5–9.) The Court also noted that Johnson took other actions like sending an "announcement to . . . Storix's customers in which [Johnson] demanded that the customers cease paying . . . Storix for the use of its software," and sending "an email to one of . . . Storix's employees declaring a hope that [Johnson's] announcement to the company's customers would result in . . .

Storix running out of money so that it would be unable to continue defending the lawsuit" and threatening "litigation that would cause the employee to lose his home." (Doc. No. 230 at 5–6.)

The Court then turned to the objective reasonableness of Johnson's litigation positions. The Court noted that, as recounted above, "Johnson's litigation tactics became increasingly unreasonable as the case progressed." (Id. at 6.) The Court further noted that:

> On March 15, 2004, Plaintiff Johnson signed an annual report (the 'Annual Report') that stated, '2003 represented the first 10 months in the life of Storix as a Corporation. Prior to 2003, Storix Software was a sole proprietorship. All assets from Storix Software were transferred to Storix Inc, as of its incorporation of February 24, 2003.' Plaintiff Johnson survived summary judgment by arguing that the Annual Report did not memorialize his intent to transfer the copyright in SBAdmin to Defendant Storix.
>
> At trial, Defendant Storix adduced overwhelming evidence demonstrating that the Annual Report did in fact memorialize Plaintiff Johnson's intent to transfer the copyright in SBAdmin. For example, shortly after the 2003 incorporation, the 'clickwrap' license for SBAdmin stated, 'Copyright (c) 1999-2003 Storix, Inc.' On January 29, 2004, Plaintiff Johnson sent an email insisting that a distributor refrain from suppressing a copyright statement in the software reading, 'Copyright (c) 1999-2003 Storix, Inc.' On February 17, 2004, and on March 7, 2007, Plaintiff Johnson signed distribution agreements that stated, 'STORIX shall retain and own all right, title and interest in [SBAdmin] . . . [and] reserves to itself all . . . benefits afforded under U.S. copyright law . . . .'
>
> Significantly, on January 24, 2006, Plaintiff Johnson stated in an email to a German lawyer who was advising Storix in a trademark dispute, 'It is not entirely possible for us to completely abolish the use of STORIX with our product, as it is the company that owns the copyright to the product, documentation, web site and support.' Plaintiff Johnson did not state that Defendant Storix was using the copyright pursuant to a license.

> Similarly, on March 26, 2007, Plaintiff Johnson sent an email to his employees instructing them to include language on the Storix website and software documentation that read, 'Copyright Storix, Inc. 1999-2007 USA.' On August 20, 2010, Plaintiff Johnson sent an email to the Oracle Corporation that stated, 'The company acquiring Storix will gain the most comprehensive disaster recovery product available for any operating system on the market.'
>
> On August 26, 2010, Plaintiff Johnson made a submission to the IBM Corporation in which he proposed selling Storix to IBM and stated, 'IBM would gain the most comprehensive disaster recovery product available for any UNIX or Linux operating system on the market . . . .' In summary, over the course of many years, Plaintiff Johnson repeatedly and consistently stated to third parties that Defendant Storix owned the copyright in SBAdmin, which was the company's most significant asset.
>
> When confronted at trial with the representations he made to third parties when he sought to sell Storix, Inc., Plaintiff Johnson stated, 'Yeah, and I lied. I admit it. I lied.' The evidence Defendant Storix adduced confirmed that the Annual Report meant what it said: when Plaintiff Johnson said he was transferring 'all assets,' he meant 'all assets,' including the copyright. In the face of this overwhelming evidence, it was unreasonable for Plaintiff Johnson to maintain that he did not intend to transfer the copyright.

(Id. at 7–9 (alterations added, citations omitted).)

The Court nevertheless concluded that, pursuant to governing Ninth Circuit precedent, Johnson's litigation positions were objectively reasonable as a matter of law because they hinged on disputed material facts that reached a jury, and the Court gave substantial weight to that assessment. (Id. at 9 (citing VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016)).) In Kirtsaeng, the Supreme Court held that a district court must give "substantial weight to the objective (un)reasonableness of a losing party's litigating position" in deciding whether to award attorneys' fees under the Copyright Act. 136 S. Ct. at 1986. Two weeks before Kirtsaeng was issued, the Ninth Circuit held that if "a plaintiff has a claim that

hinges on disputed facts sufficient to reach a jury, that claim necessarily is reasonable because a jury might decide the case in the plaintiff's favor." VMG Salsoul, 824 F.3d at 887. Bound by VGM Salsoul, the Court determined that Johnson's litigation positions were objectively reasonable as a matter of law, despite the jury's assessment that Johnson's litigation positions were unreasonable in fact.[1]

The Court next considered the degree of success obtained by Storix. The Court noted that Storix won on every material issue submitted to the jury, and therefore concluded that "the degree of success factor weighs in favor of . . . Storix." (Id. at 10.)

Thereafter, the Court evaluated whether a fee awarded was needed to advance considerations of compensation and deterrence. The Court concluded that Johnson "engaged in a variety of behaviors that should be deterred." (Id.) The Court noted that:

> On January 16, 2016, a month after the jury returned its verdict against him, Plaintiff Johnson sent an email to a Storix employee asking the employee to secretly communicate with him about what was happening inside the company and to delete their correspondence. That email also indicated that Plaintiff Johnson had been working on revising the SBAdmin software and that he had a marketable product. Additionally, the email stated, '[Storix's leadership] tell you they now own the copyright, but they don't.' In light of the jury's verdict stating

[1] The Court also followed VGM Salsoul's holding that cases that proceed to trial are always objectively reasonable despite that holding's tension with Kirtsaeng's observations that: (i) an attorneys' fees award in a copyright case is meant to give a litigant with a meritorious case "an incentive to litigate the case all the way to the end;" and (ii) "a court may not treat prevailing plaintiffs and prevailing defendants any differently[.]" 136 S. Ct. at 1985–86.

> that Defendant Storix owns all copyrights to SBAdmin, Defendant Storix sent a cease and desist letter to Plaintiff Johnson demanding that he cease copying, distribution, modification, or sale of any version of SBAdmin. On January 22, 2016, Plaintiff Johnson stated that he would not return materials related to SBAdmin and declined to respond to the demand that he cease copying, distribution, modification, or sale of SBAdmin.
>
> Plaintiff Johnson's pre-judgment litigation tactics should also be deterred. It was inappropriate for Plaintiff Johnson to tell Defendant Storix's shareholders to 'get the [expletive] out' and to attempt to coerce them into surrendering control of the company. It was inappropriate for Plaintiff Johnson to demand that Defendant Storix's customers stop paying for the use of its software in an attempt to prevent Defendant Storix from having enough money to continue defending the lawsuit. It was also inappropriate for Plaintiff Johnson to threaten Defendant Storix's directors with the loss of their homes while he was telling the customers to stop paying Storix to undermine the company.

(Id. at 10–11 (citations omitted).)

Finally, the Court considered whether Johnson's case was frivolous. The Court concluded that the case was not frivolous, as it contained disputed facts that required resolution by a jury. (Id. at 12.)

Taking all of these factors together, the Court concluded that an award of attorneys' fees to Storix was appropriate under the circumstances. The Court concluded that "Johnson's motivation, the degree of ... Storix's success, and the need to advance considerations of compensation and deterrence all weigh[ed] heavily in . . . Storix's favor." (Id. at 13.) The Court noted that these factors outweighed the fact that Johnson's case survived summary judgment, even after the Court gave substantial weight to that fact. (Id.) See Kirtsaeng, 136 S. Ct. at 1988–

89 (holding that "a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses").

After deciding that a fee award was warranted, the Court exercised its discretion to reduce the fees requested by Storix in order to narrowly tailor the award to Johnson's misconduct. Rather than awarding fees for the entirety of this litigation, the Court granted Storix only the fees it incurred from October 6, 2015—the date of Johnson's "Buckle up boys!" email—through the end of trial. (Id.) The Court excluded fees associated with: (i) opposing several of Johnson's motions in limine; (ii) mediation in the spring of 2016; (iii) and the supplemental briefing the Court ordered in light of Kirtsaeng. (Id. at 14.) The Court also declined to award any costs beyond those taxable pursuant to 28 U.S.C. § 1920. (Id.) The Court ordered Storix to submit supplemental briefing regarding the specific amount to be awarded in light of the Court's fees Order, and further considered Johnson's response. (Doc. Nos. 234, 239, 240.) The Court also denied Johnson's motion for reconsideration. (Doc. No. 238.)

After reviewing the parties' supplemental submissions, the Court issued a final Order awarding Storix $543,704, less than half of the fees and costs it had originally requested. (Doc. No. 241.) The Court found that Storix's timesheets were professional and detailed, that Storix's attorneys had not spent excessive time or used excessive staff litigating the case, and that Johnson was not entitled to a fee offset in light of the Storix shares that he owns. (Id. at 5–9.) The Court further awarded fees incurred for the litigation necessary to resolve Storix's attorneys' fees

motion. (Id.) The Court entered an amended judgment reflecting the fee award on November 16, 2016.[2] (Doc. No. 246.)

II. The Ninth Circuit's Opinion

Johnson appealed to the Ninth Circuit, and that court affirmed in part and reversed in part the Court's judgment. 716 F. App'x at 630. The Court of Appeals rejected each of Johnson's challenges to the jury's verdict, and held that the Court "did not abuse its discretion in choosing to award fees to Storix[.]" Id. at 631–32. However, the panel further held "that the amount of the award was unreasonable." Id. at 632. The panel observed that because "Johnson's claims were neither unreasonable nor frivolous, the amount of $543,704 was excessive." Id. The panel further observed that Johnson "is an individual plaintiff, rather than another company," and that the "'relative financial strength of the parties is a valid consideration' in determining 'what amount is reasonable.'" Id. (quoting Lieb v. Topstone Indus., Inc., 788 F.2d 151, 156 (3d Cir. 1986)). While the Ninth Circuit declined to "'pass judgment on what the award should be,'" it remanded with instructions for the Court to "reconsider the amount." Id. (quoting Woodhaven Homes & Realty, Inc. v. Hotz, 396 F.3d 822, 824 (7th Cir. 2005)).

---

[2] The Court stayed execution of the judgment pending appeal on the condition that Johnson agreed to post a supersedeas bond in the full amount of the judgment. (Doc. Nos. 256, 274.) Johnson posted the required bond on June 30, 2017. (Doc. No. 273.) The Ninth Circuit denied Johnson's motion to release the bond. (Doc. No. 276.)

III. The Parties' Arguments

The parties submitted supplemental briefing addressing the Ninth Circuit's decision. (Doc. Nos. 285, 288, 289.) Johnson argues that the Court should award no fees at all. (Doc. No. 288 at 19.) Storix argues that the Court's original award was fundamentally reasonable, and that the Court should therefore impose no more than a 10% reduction on remand. (Doc. No. 285 at 19.) Storix also requests post-judgment interest. (Id. at 20.)

As a preliminary matter, the Court denies Johnson's request that no fees be awarded. The Court previously decided that an award of attorneys' fees to Storix was warranted on the facts of this case, a conclusion that the Ninth Circuit affirmed. 716 F. App'x at 632. The Ninth Circuit's limited remand "to reconsider the amount" of fees to be awarded to Storix, id., is not capacious enough to permit the Court to reexamine whether to award fees at all.[3] See, e.g., In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) ("When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled . . . . [The lower] court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal . . . ."); Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1172 (9th Cir. 2006)

---

[3] The Court recognizes its discretion to award a low or nominal sum of attorneys' fees. However, as explained throughout this Order, the Court concludes that a minimal fee award would be inappropriate in light of the facts of this case.

("[W]e have repeatedly held, in both civil and criminal cases, that a district court is limited by this court's remand in situations where the scope of the remand is clear."); Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists, 422 F.3d 949, 966 (9th Cir. 2005).

Further, based on the procedural history recounted above, the Court concludes that an award of reasonable attorney fees to Storix is justified in light of Johnson's unreasonable and inappropriate litigation conduct. Accordingly, the Court will endeavor to comply with the Ninth Circuit's remand instructions to reduce Storix's award. In doing so, the Court will attempt "to do rough justice, not to achieve auditing perfection," taking into account the fact that Johnson "is an individual plaintiff, rather than another company" and that "Johnson's claims were neither unreasonable nor frivolous[.]" 716 F. App'x at 632 (citations and internal quotation marks omitted).

Discussion

I. Attorneys' Fees

The Copyright Act allows a district court, "in its discretion," to award a reasonable attorney's fee to the prevailing party" in a copyright case. 10 U.S.C. § 505. "When calculating the amount of attorney fees to be awarded in a litigation, the district court applies the lodestar method, multiplying the number of hours reasonably expended by a reasonable hourly rate." Ryan v. Editions Ltd. W., Inc., 786 F.3d 754, 763 (9th Cir. 2015). "When a party seeks an award of attorneys' fees, that party bears the burden of submitting evidence of the hours worked and the rate paid. In addition, that party has the burden to prove that the rate charged is in

line with the prevailing market rate of the relevant community." Carson v. Billings Police Dep't, 470 F.3d 889, 891 (9th Cir. 2006) (citations and quotation marks omitted). The Court may adjust the lodestar figure in light of twelve factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Carter v. Caleb Brett LLC, 757 F.3d 866, 869 (9th Cir. 2014).

In Kirtsaeng, the Supreme Court held that a district court must give "substantial weight to the objective (un)reasonableness of a losing party's litigating position" in fashioning an award of attorneys' fees. 136 S. Ct. at 1986. However, "objective reasonableness can only be an important factor in assessing fee applications—not the controlling one." Id. at 1988. The Copyright Act "confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions." Id. "For example, a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses." Id. at 1988–89; see also Spanski Enters., Inc. v. Telewizja Polska S.A., 278 F. Supp. 3d 210, 215–16 (D.D.C. 2017) (awarding attorney fees due in part to litigation misconduct in a copyright case).

The Court has thoroughly reviewed the Ninth Circuit's opinion, the parties' arguments, the relevant law, and the Court's prior fees Orders.[4] After undertaking this examination, the Court has decided to apply a 25% across-the-board reduction to Storix's original fee award. The Ninth Circuit has held "that a district court may reduce attorneys' fees by a percentage, so long as the court sets forth clear and concise reasons for adopting this approach." Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 982 (9th Cir. 2008); see also Gonzalez v. City of Maywood, 729 F.3d 1196, 1199 (9th Cir. 2013); Schwartz v. Sec'y of Health & Human Servs., 73 F.3d 895, 909 (9th Cir. 1995); Beastie Boys v. Monster Energy Co., 112 F. Supp. 3d 31, 57 (S.D.N.Y. 2015).

In this case, a percentage based approach is the most effective way for the Court to fully and faithfully comply with the Ninth Circuit's mandate. Storix's attorneys submitted clear and professional timekeeping reports justifying the fees they sought, and did not either charge excessive rates, overstaff this "bet-the-company" case, or spend excessive time litigating it. There is thus no fair basis for the Court to further adjust the lodestar figure in complying with the Ninth Circuit's directive to reduce Storix's award.

Moreover, the Ninth Circuit ordered the Court to use an essentially equitable approach in determining Storix's fees—"to do rough justice, not to achieve auditing perfection." 716 F. App'x at 632 (citation and internal quotation marks omitted). A percentage based approach permits the Court to take into account the objective

[4] The Court attaches its prior Orders to this Order as Exhibits A and B, respectively.

reasonableness of Johnson's claims and his status as an individual without unfairly impugning the work done by Storix's attorneys.

The Court concludes that reducing Storix's fees by 25% is appropriate. Although Johnson is an individual now proceeding pro se, he was represented by counsel during all proceedings for which the Court awarded attorneys' fees.[5] Further, while Johnson's claims were reasonable enough to survive summary judgment, Johnson's conduct during this litigation went well beyond what was necessary to protect his asserted legal interests. There is simply no justification for Johnson's decisions to send threatening emails to Storix employees, and to try to interfere with Storix's client relationships in the explicit hope of leaving Storix too financially crippled to defend this lawsuit. Nevertheless, this deterrence must not go so far that it deters plaintiffs (like Johnson) with reasonable claims from filing suit at all. And the Court applies the Ninth Circuit's guidance to take into account

---

[5] Johnson was originally represented by Gary Eastman of Eastman & McCartney, LLP. On January 12, 2016, the Court granted Johnson's motion to substitute Andrew Skale of Mintz Levin Cohn Ferris Glovsky & Popeo, PC, a large 500-attorney law firm ranking in the Am Law 100, as his attorney of record. (Doc. Nos. 172, 173.) On May 5, 2017, Johnson parted ways with his attorneys from Mintz Levin, (Doc. Nos. 265, 266), and subsequently retained Barnard F. King, III as his counsel of record. (Doc. No. 267.) Johnson began appearing pro se in this Court on March 28, 2018. (Doc. Nos. 280, 281.) The Court awarded attorneys' fees for litigation that took place between October 6, 2015 and November 16, 2016, when Johnson was variously represented by Eastman & McCartney and Mintz Levin, respectively.

As Storix correctly points out, Johnson was represented by three attorneys (Gary Eastman, Tifanie Nelson, and Joseph Harkins) at trial, as compared with only two attorneys for Storix (Paul Tyrell and Sean Sullivan). (Doc. No. 148.) Johnson also sued his attorneys from Mintz Levin—who handled his posttrial representation—in the San Diego County Superior Court after paying them $375,000 for nine months of legal work. (Doc. No. 285-1, Tyrell Decl., Ex. B.) The amount that Johnson paid for his own highend legal representation post-trial undercuts any argument that the fees Storix requests are unreasonably inflated.

the fact that Johnson "is an individual plaintiff, rather than another company." 716 F. App'x at 632. The Court determines that applying a 25% reduction in Storix's fees leaves an award that is sufficient to deter Johnson's conduct, without being excessive or unreasonable under the circumstances.

The Court's 25% reduction also takes into account the Court's decision, upon further reflection, that awarding Storix attorneys' fees for its four unsuccessful motions in limine (Doc. Nos. 134, 135, 136, 137), and its post-verdict briefing on its motion for attorneys' fees and nontaxable costs, would not advance the purposes animating the Court's fee award. As the Court has previously explained, Storix's fee award was made after balancing Johnson's improper motivations in bring this suit, the need to deter his inappropriate litigation conduct, and Storix's success, with the fact that Johnson's claims were objectively reasonable as a matter of law. (Doc. No. 230 at 13.) The fees Storix incurred for its unsuccessful motions in limine and its attorneys' fees briefing did not stem from Johnson's improper conduct, or Storix's success on the merits of this litigation, and thus granting those fees would not further the Court's purposes in making the award.

The Court accordingly reduces Storix's attorneys' fees from $543,704 to $407,778.

II. Post-Judgment Interest

Federal law provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). "Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the

weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." Id. "Under 28 U.S.C. § 1961, the award of post judgment interest on a district court judgment is mandatory." Barnard v. Theobald, 721 F.3d 1069, 1078 (9th Cir. 2013); Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986). "Where a single item such as attorneys' fees is reduced on appeal, the district court's determination should be viewed as correct to the extent it was permitted to stand, and interest on a judgment thus partially affirmed should be computed from the date of its initial entry." Perkins v. Standard Oil Co. of Cal., 487 F.2d 672, 767 (9th Cir. 1973). Accordingly, the Court awards Storix post-judgment interest on the reduced attorneys' fees award at a rate of 0.695% running from November 16, 2016 until the date of payment. The interest shall be compounded annually. 28 U.S.C. § 1961(b).

Conclusion

For the foregoing reasons, the Court: (i) applies a 25% across-the-broad equitable reduction to Storix's attorneys' fees; and (ii) awards Storix post-judgment interest. The Court will separately issue an amended judgment reflecting the fees and interest owed to Storix.

IT IS SO ORDERED.

DATED: August 7, 2018

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, Plaintiff and Counter-Defendant, v. STORIX, INC., a California corporation, Defendant and Counter-Claimant.	Case No.: 3:14-cv-01873-H-BLM **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS** [Doc. No. 165.]

On August 8, 2014, Plaintiff and Counter-Defendant Anthony Johnson ("Plaintiff Johnson") filed a complaint alleging copyright infringement of a software program. (Doc. No. 1.) On September 19, 2014, Defendant and Counter-Claimant Storix, Inc .. ("Defendant Storix") filed an answer and counterclaim seeking a declaratory judgment that it did not infringe any copyright and that it owned all copyrights in the software. (Doc. No. 5.) On December 8, 2015, the action came before the Court for a jury trial. (Doc. No. 142.) On December 15, 2015, the jury returned a verdict in favor of Defendant Storix. (Doc. No. 160.) On December 18, 2015, the Court entered judgment in favor of Defendant Storix and awarded costs to Defendant Storix as provided by law. (Doc. No. 164.)

On January 4, 2016, Defendant Storix filed its bill of costs. (Doc. No. 166.) On January 25, 2016, the Clerk granted Defendant Storix taxable costs pursuant to 28 U.S.C. § 1920 amounting to $11,414.64. (Doc. No. 178.)

On January 4, 2016, Defendant Storix filed a motion pursuant to 17 U.S.C. § 505 seeking costs not taxable under 28 U.S.C. § 1920 as well as attorneys' fees. (Doc. No. 165.) On January 29, 2016, Plaintiff Johnson opposed Defendant Storix's motion for costs and fees. (Doc. No. 180.) On February 12, 2016, Defendant Storix replied to Plaintiff Johnson's opposition.[1] (Doc. No. 184.) On February 23, 2016, the Court held. a hearing on the motion. Andrew Skale and Anne-Marie Dao appeared for Plaintiff Johnson, and Paul Tyrell and Sean M. Sullivan appeared for Defendant Storix.

At the request of the parties, on February 25, 2016, the Court permitted mediation before a magistrate judge. (Doc. No. 194.) The parties participated in mediation sessions on March 29, 2016 and April 4, 2016. (Doc. Nos. 202, 204.) On May 5, 2016, the magistrate judge issued a minute entry indicating that the parties were unable to reach a settlement. (Doc. No. 213.)

On June 16, 2016, the Supreme Court issued an opinion in Case No. 15-375, Kirtsaeng v. John Wiley & Sons, Inc. At the Court's request, each party filed a memorandum explaining how that decision should impact the Court's analysis of Defendant's motion for costs and fees on July 18, 2016. (Doc. Nos. 217, 218.) Each

---

[1] On January 29, 2016, Defendant Storix filed a supplement to its motion for fees and costs. (Doc. No. 179.) On February 3, 2016, Plaintiff Johnson objected to the supplement. (Doc. No. 181.) On February 19, 2016, Plaintiff Johnson opposed the supplement. (Doc. No. 188.) On February 19, 2016, Defendant Storix filed a second supplement to its motion for fees and costs. (Doc. No. 189.) On February 22, 2016, Plaintiff Johnson objected to the second supplement. (Doc. No. 190.) On February 22, 2016, the Court granted Plaintiff Johnson until March 4, 2016, to file a response to the second supplement, but Plaintiff did not file a response. (Doc. No. 191.)

party filed a response to the other party's memorandum on August 1, 2016. (Doc. Nos. 223, 224.) On August 2, 2016, Plaintiff Johnson objected to Defendant Storix's response memorandum.[2] (Doc. No. 227.) On August 15, 2016, the Court heard supplemental argument on the motion. Andrew Skale and Ben Wagner appeared for Plaintiff, and Paul Tyrell and Sean Sullivan appeared for Defendant. For the reasons that follow, the Court grants in part and denies in part the motion for costs and fees.

Discussion

I. Legal Standards

The Copyright Act states, "In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. In its recent opinion in Kirtsaeng v. John Wiley & Sons, Inc., the Supreme Court confirmed that there are a number of nonexclusive factors that courts may consider in determining whether a proposed award "advances the Copyright Act's goals" of "encouraging and rewarding authors' creations while also enabling others to build on that work." 136 S. Ct. 1979, 1986 (2016). These factors include motivation, the objective unreasonableness of the losing party's factual and legal arguments, the degree of success obtained, the need,

---

[2] The Court has considered all of the objections raised by the parties in connection with this motion. To the extent the objections are valid, the Court sustains them. To the extent the objections are invalid, the Court overrules them.

in particular circumstances, to advance considerations of compensation and deterrence, and frivolousness. Id. at 1985; Fogerty v. Fantasy, Inc., 510 U.S. 517,534 18 n.19 (1994); Omega S.A. v. Costco Wholesale Corp 776 F.3d 692, 695-96 (9th Cir. 2015).

In weighing these factors, Courts must "give substantial weight to the objective reasonableness of the losing party's position." Kirtsaeng. 136 S. Ct. at 1983. An unsuccessful position is not necessarily objectively unreasonable, and courts must not "confuse[] the issue of liability with that of reasonableness." Id. at 1988. Reasonableness or unreasonableness is not dispositive, and courts "must also give due consideration to all other circumstances relevant to granting fees." Id. at 1983. Courts retain "discretion, in light of those factors, to make an award even when the losing party advanced a reasonable claim or defense." Id. "There is no precise rule or formula for making these determinations .... " Fogerty, 510 U.S. at 534. "Prevailing plaintiffs and prevailing defendants are to be treated alike." Id. at 534; see also Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1120 (9th Cir. 2007).

"When calculating the amount of attorney fees to be awarded in a litigation, the district court applies the lodestar method, multiplying the number of hours reasonably expended by a reasonable hourly rate." Ryan v. Editions Ltd. W., Inc., 786 F.3d 754, 763 (9th Cir. 2015). "When a party seeks an award of attorneys' fees, that party bears the burden of submitting evidence of the hours worked and the rate paid. In addition, that party has the burden to prove that the rate charged is in line with the prevailing market rate of the relevant community." Carson v. Billings

Police Dep't, 470 F.3d 889, 891 (9th Cir. 2006) (citations and quotation marks omitted). The Court may adjust the lodestar figure in light of twelve factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Carter v. Caleb Brett LLC. 757 F.3d 866, 869 (9th Cir. 2014). In addition to attorneys' fees, "district courts may award otherwise non-taxable costs, including those that lie outside the scope of [28 U.S.C.] § 1920, under [17 U.S.C.] § 505." Twentieth Century Fox Film Corp. v. Entm't Distrib., 429 F.3d 869, 885 (9th Cir. 2005).

II. Recovery of Fees

In evaluating whether to award attorneys' fees, the Court considers Plaintiff Johnson's motivations. the reasonableness of Plaintiff Johnson's positions, the degree of Defendant Storix' s success, the need to advance considerations of compensation and deterrence, and the frivolousness of Plaintiff Johnson's litigation positions and tactics. Kirtsaeng. 136 S. Ct. at 1985; Fogerty, 510 U.S. at 534 n.19; Omega S.A., 776 F.3d at 695-96.

A. Motivation

The Court first considers Plaintiff Johnson's motivation in bringing the case. Kirtsaeng, 136 S. Ct. at 1985; Omega S.A., 776 F.3d at 695. "[A] court's discretion

may be influenced by the plaintiff's culpability in bringing or pursuing the action, but blameworthiness is not a prerequisite to awarding fees to a prevailing defendant." Fantasy. 94 F.3d at 558. In this case, Plaintiff Johnson took a number of actions demonstrating that his motivation was not simply to win damages for alleged copyright infringement. On September 26, 2015, Plaintiff Johnson sent an email to several Storix directors and employees titled "Buckle up boys!" (Doc. No. 66-1, Huffman Decl. Ex. A, at 5-9.) The email stated in part:

> That means, when I win the very near copyright decision, which we all know I will, the company will be paying back all my legal expenses. And you will be paying the company back, for mine and its expenses.
>
> ...
>
> Here's your one option. Get the f[...] out. Give your stock back to the company, resign your board seat, terminate your employment. Leave with just what you gave me. Only then your name will be removed from the derivative[] action, giving you some hope of keeping your homes and perhaps finding other jobs. But once this is filed, all options are off the table. The damages I will be granted in the copyright case will transfer from the company to YOU.

(Id.)

Plaintiff Johnson also stated in that email that he would send an announcement to Defendant Storix's customers and tell them, among other things, that the software they purchased from Defendant Storix infringed on Plaintiff Johnson's copyright. (Id.) On October 6, 2015, Plaintiff Johnson sent the announcement to Defendant Storix's customers in which he demanded that the customers cease paying Defendant Storix for the use of its software. (Doc. No. 66-1, Huffman Decl. Ex. B, at 10-11.) On October 7, 2016, Plaintiff Johnson sent an email to one of Defendant Storix's employees declaring a hope that his announcement to

the company's customers would result in Defendant Storix running out of money so that it would be unable to continue defending the lawsuit. (Doc. No. 66-1, Huffman Decl. Ex. D, at 16.) In that email, Plaintiff Johnson also threatened litigation that would cause the employee to lose his home. (Id.)

"Courts have held a plaintiff demonstrates bad faith when alleging [a] copyright claim to secure benefits other than merely addressing grievances." Brighton Collectibles, Inc. v. Pedre Watch Co., No. 3:11-CV-00637 AJB WVG, 2014 WL29008, at *4 (S.D. Cal. 6 Jan. 2, 2014) (citing Maljack Prod., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 889 (9th Cir.1996)). In this case, Plaintiff Johnson demonstrated that his motives were not merely to secure a copyright infringement judgment, but also to wrest control of the company from its majority shareholders and to force the company to "close its doors." (Doc. No. 66-1, Huffman Decl. Ex. D, at 16.) Accordingly, Plaintiff Johnson's motivations weigh in favor of Defendant Storix's request for attorneys' fees.[3]

---

[3] The Court recognizes that Plaintiff Johnson has had a difficult time realizing that he no longer controls Defendant Storix and its product. Plaintiff Johnson created SBAdmin, a software program for backing up files stored on computers, in 1998 and 1999 while he was a sole proprietor doing business as Storix Software. (Doc. No. 145, Trial Transcript Vol. I, at 82-90.) In 2003, Plaintiff Johnson incorporated Defendant Storix, and he transferred assets to Defendant Storix. (Doc. No. 145, Trial Transcript Vol. I, at 138.) From 2003 to 2011, Plaintiff Johnson was the president and sole shareholder of Defendant Storix, a corporation that existed primarily to sell copies of SBAdmin to customers. In 2011, due to illness, Plaintiff Johnson stepped down from his leadership position and gifted sixty percent of Defendant Storix' s outstanding stock to certain employees, thereby reducing Plaintiff Johnson's ownership in Defendant Storix to forty percent. (Doc. No. 145, Trial Transcript Vol. I, at 159-71.) Now a minority shareholder, Plaintiff Johnson desires to exert majority control over the company, but this desire does not reflect the reality of his current business situation.

B. Objective Reasonableness

In considering whether to award attorney fees, the Court gives "substantial weight" to its assessment of Plaintiff Johnson's reasonableness over the course of the litigation. Kirtsaeng, 136 S. Ct. at 1983. Plaintiff Johnson's litigation tactics became increasingly unreasonable as the case progressed. In his September 26, 2015, "Buckle up boys!" email, Plaintiff Johnson threatened Storix employees and shareholders with ruinous litigation if they did not surrender control of the company to him and resign from their jobs. (Doc. No. 66-1, Huffman Decl. Ex. A, at 5-9.) In his October 6, 2015, announcement to Storix customers, Plaintiff Johnson predicted an end to customer support for SBAdmin and demanded that the customers cease paying Defendant Storix for the use of its software. (Doc. No. 66-1, Huffman Decl. Ex. B, at 10-11.) In his October 7, 2016, email to one of Defendant Storix's employees, Plaintiff Johnson declared an intention to force Defendant Storix to "close its doors" and threatened litigation that would cause the employee to lose his home. (Doc. No. 66-1, Huffman Decl. Ex. D, at 16.)

The parties went to trial to determine whether Plaintiff Johnson transferred his copyright in SBAdmin to Defendant Storix in 2003 at the time of Defendant Storix' s incorporation. The Ninth Circuit recently held that, "[i]f a plaintiff has a claim that hinges on disputed facts sufficient to reach a jury, that claim necessarily is reasonable because a jury might decide the case in the plaintiff's favor." VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016). Other courts, however, have noted that a "'claim that is not 'objectively unreasonable' at the outset can

become so if the litigant continues to pursue it when the litigant knew or should have known that the chance of success was slim to none.'" Erickson Prods. Inc. v. Kast, No. 5:13-CV-05472-HRL, 2016 WL 3951659, at *2 (N.D. Cal. July 22, 2016) (quoting Frost-Tsuji Architects v. Highway Inn, Inc., No. 13-00496 SOM/BMK, 2015 WL 5601853, at *5 (D. Hawaii, Sept. 23, 2015)). And, in Kirtsaeng. The Supreme Court noted that an attorneys' fees award in a copyright case is meant to give a litigant with a meritorious case "an incentive to litigate the case all the way to the end." 136 S. Ct. at 1986.

Applying these legal standards, the Court evaluates the objective reasonableness of Plaintiff Johnson's positions. On March 15, 2004, Plaintiff Johnson signed an annual report (the "Annual Report") that stated, "2003 represented the first 10 months in the life of Storix as a Corporation. Prior to 2003, Storix Software was a sole proprietorship. All assets from Storix Software were transferred to Storix Inc, as of its incorporation of February 24, 2003." (Doc. No. 165-5, Trial Exhibit CD, at 35.) Plaintiff Johnson survived summary judgment by arguing that the Annual Report did not memorialize his intent to transfer the copyright in SBAdmin to Defendant Storix. (Doc. Nos. 56 at 12; 84 at 5-7.) See Radio Television Espanola S.A. v. New World Entm't, Ltd., 183 F.3d 922, 927 (9th Cir. 1999) ("[T]he parties' intent as evidenced by the writing must demonstrate a transfer of the copyright.") (citing Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 10.03[A][2] at 10-37 ("As with all matters of contract law, the essence of the inquiry here is to effectuate the intent of the parties.")); Provenz v. Miller, 102

F.3d 1478, 1489 (9th Cir. 1996) ("Cases where intent is a primary issue generally are inappropriate for summary judgment ..... .").

At trial, Defendant Storix adduced overwhelming evidence demonstrating that the Annual Report did in fact memorialize Plaintiff Johnson's intent to transfer the copyright in SBAdmin. For example, shortly after the 2003 incorporation, the "clickwrap" license for SBAdmin stated, "Copyright (c) 1999-2003 Storix, Inc." (Doc. No. 165-5, Trial Exhibit BQ, at 9.) On January 29, 2004, Plaintiff Johnson sent an email insisting that a distributor refrain from suppressing a copyright statement in the software reading, "Copyright (c) 13 1999-2003 Storix, Inc." (Doc. No. 165-5, Trial Exhibit BY, at 17.) On February 17, 2004, and on March 7, 2007, Plaintiff Johnson signed distribution agreements that stated,

> "STORIX shall retain and own all right, title and interest in the Software and Document-ation, and each copy thereof, and all intellectual property rights with respect thereto without limiting the generality of the foregoing, STORIX claims and reserves to itself all right in the Software and any associated document-ation and all benefits afforded under U.S. copyright law, all international copyright conventions, and U.S. and international intellectual property law."

(Doc. No. 165-5, Trial Exhibits CC, DL, at 20, 54.) Significantly, on January 24, 2006, Plaintiff Johnson stated in an email to a German lawyer who was advising Storix in a trademark dispute, "It is not entirely possible for us to completely abolish the use of STORIX with our product, as it is the company that owns the copyright to the product, documentation, web site and support." (Doc. No. 165-5, Trial Exhibit CQ, at 45.) Plaintiff Johnson did not state that Defendant Storix was using the copyright pursuant to a license. (See Doc. No. 223 at 4.)

Similarly, on March 26, 2007, Plaintiff Johnson sent an email to his employees instructing them to include language on the Storix website and software documentation that read, "Copyright Storix, Inc. 1999-2007 USA." (Doc. No. 165-5, Trial Exhibit DQ, at 69.) On August 20, 2010, Plaintiff Johnson sent an email to the Oracle Corporation that stated, "The company acquiring Storix will gain the most comprehensive disaster recovery product available for any operating system on the market." (Doc. No. 165-5, Trial Exhibit FP, at 71.) On August 26, 2010, Plaintiff Johnson made a submission to the IBM Corporation in which he proposed selling Storix to IBM and stated, "IBM would gain the most comprehensive disaster recovery product available for any UNIX or Linux operating system on the market .... " (Doc. No. 165-5, Trial Exhibit FQ, at 76.) In summary, over the course of many years, Plaintiff Johnson repeatedly and consistently stated to third parties that Defendant Storix owned the copyright in SBAdmin, which was the company's most significant asset.

When confronted at trial with the representations he made to third parties when he sought to sell Storix, Inc., Plaintiff Johnson stated, "Yeah, and I lied. I admit it. I lied." (Doc. No. 146, Trial Transcript Vol. II, at 203). The evidence Defendant Storix adduced confirmed that the Annual Report meant what it said: when Plaintiff Johnson said he was transferring "all assets," he meant "all assets," including the copyright. See Radio Television, 183 F.3d at 927. In the face of this overwhelming evidence, it was unreasonable for Plaintiff Johnson to maintain that he did not intend to transfer the copyright. Nevertheless, the Ninth Circuit has

stated that, for purposes of awarding attorneys' fees, claims such as Plaintiff Johnson's are necessarily reasonable if they hinge on disputed facts sufficient to reach a jury. VMG Salsoul, 824 F.3d at 887. Accordingly, the Court concludes the Plaintiff Johnson's position was objectively reasonable, at least through the conclusion of trial, and the Court gives "substantial weight" to this assessment.[4] Kirtsaeng, 136 S. Ct. at 1983; VMG Salsoul, 824 F.3d at 887.

C. Degree of Success

The Court next considers "the degree of success obtained" by Defendant Storix. Omega S.A., 776 F.3d at 695. According to the jury's special verdict, Plaintiff Johnson proved that "he obtained a valid copyright for an original work of authorship relating to SBAdmin." (Doc. No. 160 at 2.) The jury answered in Defendant Storix's favor on Plaintiff Johnson's claim for copyright infringement and found that Defendant Storix "owns all rights to the copyrights to all versions of SBAdmin." (Doc. No. 160.) This was not a case in which the prevailing party achieved only a limited degree of success or won on a technicality. See Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1231 (9th Cir. 1997) (quoting Hensley v. Eckerhart, 461 U.S. 424, 436-37 (1983)); Fantasy, Inc. v. Fogerty, 94 F.3d 553, 560 (9th Cir. 1996). On the contrary, as the Court stated in its

---

[4] The Court notes the tension between the Ninth Circuit's holding that cases that proceed to trial are objectively reasonable, VMG Salsoul, 824 F.3d at 887, and the Supreme Court's observation that an attorneys' fees award in a copyright case is meant to give a litigant with a meritorious case "an incentive litigate the case all the way to the end." Kirtsaeng. 136 S. Ct. at 1986.

judgment, the verdict was in Defendant Storix's favor. (Doc. No. 164 at 2.) Accordingly, the degree of success factor weighs in favor of Defendant Storix.

D. Considerations of Compensation and Deterrence

The Court next considers "'the need in particular circumstances to advance considerations of compensation and deterrence.'" Kirtsaeng, 136 S. Ct. at 1985 (quoting Fogerty, 510 U.S. at 534 n.19). Plaintiff engaged in a variety of behavior that should be deterred. On January 16, 2016, a month after the jury returned its verdict against him, Plaintiff Johnson sent an email to a Storix employee asking the employee to secretly communicate with him about what was happening inside the company and to delete their correspondence. (Doc No. 216-2, Bonert Decl. Ex. 1, at 3-4.) That email also indicated that Plaintiff Johnson had been working on revising the SBAdmin software and that he had a marketable product. (Id. at 3.) Additionally, the email stated, "[Storix' s leadership] tell you they now own the copyright, but they don't." (Id.) In light of the jury's verdict stating that Defendant Storix owns all copyrights to SBAdmin, Defendant Storix sent a cease and desist letter to Plaintiff Johnson demanding that he cease copying, distribution, modification, or sale of any version of SBAdmin. (Doc. No. 216-4, Tyrell Decl. Ex. 5, at 26-27.) On January 22, 2016, Plaintiff Johnson stated that he would not return materials related to SBAdmin and declined to respond to the demand that he cease

copying, distribution, modification, or sale of SBAdmin.[5] (Doc. No. 216-4, Tyrell Decl. Ex. 8, at 31-32.)

Plaintiff Johnson's pre-judgment litigation tactics should also be deterred. It was inappropriate for Plaintiff Johnson to tell Defendant Storix's shareholders to "get the [expletive] out' and to attempt to coerce them into surrendering control of the company. (Doc. No. 66-1, Huffman Decl. Ex. A, at 5-9.) It was inappropriate for Plaintiff Johnson to demand that Defendant Storix's customers stop paying for the use of its software in an attempt to prevent Defendant Storix from having enough money to continue defending the lawsuit. (Doc. No. 66-1, Huffman Decl. Ex. B, at 10-11, Huffman Decl. Ex. D, at 16.) It was also inappropriate for Plaintiff Johnson to threaten Defendant Storix's directors with the loss of their homes while he was telling the customers to stop paying Storix to undermine the company. (Doc. No. 66-1, Huffman Decl. Ex. A, at 5-9, Huffman Decl. Ex. D, at 16.) This inappropriate conduct should be deterred. See Omega S.A., 776 F.3d at 15 695-96.

An award of attorneys' fees is justified to deter litigants in copyright cases from interfering with the rights of a copyright holder. Scorpio Music (Black Scorpio) S.A. v. Willis, No. 3:11-CV-1557 BTM RBB, 2015 WL 5476116, at *3 (S.D. Cal. Sept. 15, 2015). An award is also justified when a party's actions unnecessarily expand another party's work. Love v. Mail on Sunday, No. CV05-7798 ABC (PJWX), 2007 WL 2709975, at *5 (C.D. Cal. Sept. 7, 2007), aff'd sub nom. Love v. Associated

[5] As a result of Plaintiff Johnson's refusal, Defendant Storix has filed a motion for further relief pursuant to 28 U.S.C. § 2202, which remains pending. (Doc. No. 216.)

Newspapers, Ltd., 611 F.3d 601 (9th Cir. 2010). "[T]he need in [these] particular circumstances to advance considerations of ... deterrence" is strong, see Kirtsaeng, 136 S. Ct. at 1985, and this factor weighs in favor of Defendant Storix' s request for attorneys' fees.

E. Frivolousness

Finally, the Court considers whether Plaintiff Johnson's case was frivolous. Kirtsaeng, 136 S. Ct. at 1985. "[A] frivolous claim under the Copyright Act is one that, in either the factual or legal assertions, is clearly baseless, involving fantastic or delusional scenarios." Perfect 10, Inc. v. Giganews, Inc., No. CV 11-07098-AB SHX, 2015 WL 1746484, at *8 (C.D. Cal. Mar. 24, 2015) (citations and quotation marks omitted); see also Perfect 10. Inc. v. Visa Int'l Serv. Ass'n, No. C 04-00371 JW, 2005 WL 2007932, at *4 (N.D. Cal. Aug. 12, 2005) (citing Neitzke v. Williams, 490 U.S. 324, 325-328 (1989)). Plaintiff Johnson ultimately lost, but his claims did not rise to the level of fantasy or delusion. See Bisson-Dath v. Sony Computer Entm't Am. Inc., No. CV-08-1235 SC, 2012 WL 3025402, at *2 (N.D. Cal. July 24, 2012) ("A claim is not frivolous merely because it is unsuccessful."). Indeed, the Court previously stated that the case was not frivolous. (Doc. No. 214, February 23, 2016 Hearing Transcript, at 42.)

Although Plaintiff Johnson's case was not frivolous, this factor's weighing in his favor is not dispositive as to Defendant Storix's request for attorneys' fees. It used to be that "a copyright defendant had to show that the plaintiff's claim was frivolous or made in bad faith in order to be entitled to fees," but this is no longer

the rule. Mattel, Inc. v. MGA Entm't, Inc., 705 F.3d 1108, 1111 (9th Cir. 2013). Rather, frivolousness is one of many factors the Court weighs in determining whether to award attorneys' fees. Kirtsaeng, 136 S. Ct. at 1985.

F. Award of Attorneys' Fees

The Court concludes that, under Ninth Circuit precedent, Plaintiff Johnson's position was objectively reasonable on the grounds that the case proceeded to trial.[6] See VMG Salsoul, 824 F.3d at 887. The Court gives "substantial weight" to this assessment, Kirtsaeng, 136 S. Ct. at 1983, and this factor counts in Plaintiff Johnson's favor. Nevertheless, the Court awards attorneys' fees to Defendant Storix on the basis of the factors to which the Court gives normal weight. Plaintiff Johnson's motivation, the degree of Defendant Storix's success, and the need to advance considerations of compensation and deterrence all weigh heavily in Defendant Storix's favor. The factors that count in Plaintiff Johnson's favor are his case's lack of frivolousness and that it survived summary judgment, and the Court concludes that these considerations are insufficient to overcome the strength of the factors that count in Defendant Storix's favor. See Kirtsaeng, 136 S. Ct. at 1985; Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994); Omega S.A. v. Costco Wholesale Corp., 776 F.3d 692, 695-96 (9th Cir. 2015). Accordingly, the Court awards attorneys' fees to Defendant Storix.

---

[6] This precedent may conflict with the Supreme Court's statement in Kirtsaeng that an attorneys' fees award in a copyright case is meant to give a litigant with a meritorious case "an incentive to litigate the case all the way to the end." 136 S. Ct. at 1986. But the Court leaves it to the Ninth Circuit to resolve this potential issue.

III. Calculation of Attorneys' Fees and Costs

In calculating the fees to be awarded, the Court uses the lodestar method, and it requires the prevailing party to submit evidence demonstrating that the fees sought are the result of multiplying the number of hours reasonably expended by a reasonable hourly rate. Ryan, 786 F.3d at 763. Defendant Storix has adequately demonstrated that the rates its attorneys charged were "in line with the prevailing market rate of the relevant community." Carson, 470 F.3d at 891. (Doc. No. 165-2, Tyrell Decl. ¶¶ 20-21.) Accordingly, the Court declines to adjust the lodestar factor at this time pending review of Defendant Storix' s final invoices. See Carter, 757 F.3d at 869.

In considering Defendant Storix' s request for attorneys' fees in light of the Kirtsaeng factors, the Court awards Defendant Storix with the attorneys' fees it incurred in this case on and after October 6, 2015, the date of Plaintiff Johnson's email that sought to convince customers to cease paying Defendant Storix so that Defendant Storix would have insufficient funds to continue defending the lawsuit. (Doc. No. 66-1, Huffman Decl. Ex. B, at 10-11, Huffman Deel. Ex. D, at 16.) This award is subject to certain exceptions and other applicable considerations.

The Court excludes from this award fees associated with opposing Plaintiff Johnson's motions in limine to preclude the testimony of BarbaraFrederiksen-

Cross.[7] The award also excludes any fees associated with the mediation in which the parties participated before the magistrate judge in the spring of 2016 because those efforts represented the parties' good faith attempts to resolve a variety of issues.[8] Additionally, exercising the Court's discretion, the Court excludes from the award any fees related to the briefing that Defendant Storix provided regarding Kirtsaeng v. John Wiley & Sons, Inc., including Defendant Storix's response to Plaintiff Johnson's brief and all declarations in support of those briefs, because that briefing was initiated at the Court's request and potentially involved a change in the law. (Doc. No. 215.) The Court declines at this time to award fees related to Defendant Storix's motion for further relief pursuant to 28 U.S.C. § 2202 because the motion is still pending.

Defendant Storix also seeks costs not taxable under 28 U.S.C. § 1920. (Doc. No. 165-1 at 24-25.) See Civ. L. R. 54.1. Exercising its discretion, the Court declines to award additional costs beyond those taxable under 28 U.S.C. § 1920.[9] See Twentieth Century Fox, 429 F.3d at 885.

In light of the time that has elapsed since Defendant Storix filed its motion for attorneys' fees, the Court cannot finalize its calculation of the fee award.

---

[7] The jury found in Plaintiff Johnson's favor on the issue of whether he obtained a valid copyright in SBAdmin Version 1.3. (Doc. Nos. 87, 160.)

[8] In addition to the disagreements related to this case, Plaintiff Johnson remains a minority shareholder of Defendant Storix, and the parties have also referenced state court litigation. Accordingly, mediation had the potential to address a number of disputes.

[9] The Court notes that approximately half of the costs Defendant Storix seeks are for fees paid to its technology expert, Barbara Frederiksen-Cross, who Defendant Storix did not call at trial. (Doc. No. 165-4, Tyrell Decl. Ex. 8, at 240-55; Doc. No. 179-2, Tyrell Decl. Ex. 18, at 2-4.) The Court has reviewed the other costs Defendant Storix seeks and also declines to award those costs.

Plaintiff Johnson has also asked for an opportunity to file an additional opposition because briefing on this motion was temporarily put on hold pending the mediation. (Doc. No. 194.) Due to the piecemeal manner in which this motion was briefed, the Court orders Defendant Storix to file, within thirty days of the date of this order, a self-contained memorandum detailing the fees it seeks consistent with this order. That memorandum must be accompanied by all supporting invoices for time worked from October 6, 2015, to August 15, 2016. Defendant Storix may not seek fees for any time that was originally billed to a matter other than this matter or for any time for which its attorneys did not charge (whether due to a "courtesy discount" or otherwise). (See Doc. No. 165-2, Tyrell Decl.][22.) Additionally, Defendant Storix must provide a final chart detailing the fees it seeks pursuant to this order. The chart or memorandum must account for any discounts and must specifically identify any time entries that are excluded from the award, including entries that were erroneously billed to this matter. (See id.) The Court also orders Defendant Storix to specify in a chart the portion of its total fees that are related to its request for costs and fees.[10]

Plaintiff Johnson may object to any specific time entries within thirty days of when Defendant Storix files its memorandum. Defendant Storix may file an optional response to any of Plaintiff Johnson's objections within seven days of when Plaintiff Johnson files his objections. The Court reserves the right to further

---

[10] Compare Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2169 (2015) with Bell v. Lantz. No. 15-2341, 2016 WL 3361557, at *3 (7th Cir. June 17, 2016).

consider the reasonableness of the fees and to exclude specific categories of fees once it has reviewed the updated invoices.

Conclusion

The Court grants in part and denies in part Defendant Storix' s motion for costs and 18 attorneys' fees. The Court declines to award additional costs beyond those taxable under 28 U.S.C. § 1920. The Court awards Defendant Storix with the attorneys' fees it incurred in district court litigation in this matter on and after October 6, 2015. The Court excludes from this award any fees associated with opposing Plaintiff Johnson's motions in limine to preclude the testimony of Barbara Frederiksen-Cross, any fees associated with the mediation in which the parties participated before the magistrate judge in the spring of 2016, and any fees related to the briefing that Defendant Storix provided regarding Kirtsaeng v. John Wiley & Sons, Inc. Defendant Storix must file a memorandum detailing the fees it seeks consistent with this order within thirty days of the date of this order. Plaintiff Johnson may object to any specific time entries within thirty days of the date when Defendant Storix files its memorandum. Defendant Storix may file an optional response to any of Plaintiff Johnson's objections within seven days of when Plaintiff Johnson files his objections.

IT IS SO ORDERED.

DATED: August 17, 2016

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT

D. District Court Second Amended Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, Plaintiff, v. STORIX, INC., a California corporation, Defendant.	Case No.: 3:14-cv-01873-H-BLM **SECOND AMENDED JUDGMENT IN FAVOR OF DEFENDANT AND COUNTER-CLAIMANT STORIX, INC.**

On December 8, 2015, this action came before the Court for a jury trial with the Honorable Marilyn L. Huff presiding. (Doc. No. 142.) The issues have been tried, and on December 15, 2015, the jury rendered its unanimous verdict on the following questions:

Has Anthony Johnson proved by a preponderance of the evidence that he obtained a valid copyright registration for an original work of authorship relating to SBAdmin Version 1.3?

The jury answered: Yes.

Has Anthony Johnson proved by a preponderance of the evidence that Storix, Inc.'s SBAdmin Version 8.2 infringed the copyrighted work by copying protectable original elements of SBAdmin Version 1.3?

The jury answered: No.

Has Storix, Inc. proved by a preponderance of the evidence that Anthony Johnson's copyright infringement claim against Storix, Inc. is barred because Anthony Johnson transferred ownership of all pre-incorporation copyrights, including SBAdmin Version 1.3, in writing from himself to Storix, Inc.?

The jury answered: Yes.

Has Storix, Inc. proved by a preponderance of the evidence that it owns all rights to the copyrights to all versions of SBAdmin?

The jury answered: Yes.

Has Storix, Inc. proved by a preponderance of the evidence that it owns the copyright to changes made to the SBAdmin software from the time of Storix, Inc.'s incorporation due to Anthony Johnson's work for hire as an employee of Storix, Inc.?

The jury answered: Yes.

Has Storix, Inc. proved by a preponderance of the evidence that Anthony Johnson's copyright infringement claim against Storix, Inc. is barred by the statute of limitations for copyright infringement?

The jury answered: Yes.

Did Anthony Johnson prove by a preponderance of the evidence that Storix, Inc. engaged in willful copyright infringement?

The jury answered: No.

(Doc. No. 160.)

The jury verdict was in Defendant and Counter-Claimant Storix's favor on all causes of action. Accordingly, pursuant to the jury's findings, the Court entered

judgment in favor of Defendant and Counter-Claimant Storix, and against Plaintiff Anthony Johnson, on the causes of action of copyright infringement and declaratory judgment. (Doc. No. 164.) The Court also awarded costs to Defendant and Counter-Claimant Storix as provided by law. (Id.)

On January 25, 2016, the Clerk of the Court awarded Storix $11,414.64 in taxable costs. (Doc. No. 178.) On August 17, 2016, the Court granted in part and denied in part Storix's motion for costs and fees. (Doc. No. 230.) The Court declined to award additional costs beyond those taxable under 28 U.S.C. § 1920. (Id.) On August 7, 2018, the Court awarded Storix attorneys' fees in the amount of $407,778. (Doc. No. 298.) The Court further awarded mandatory post-judgment interest at a rate of 0.695%, compounded annually, running from November 16, 2016 until the date of payment. (Id.) Storix has therefore been awarded a total of $419,192.64, plus interest.

The Court enters an amended judgment in favor of Defendant and Counter-Claimant Storix, and against Plaintiff Anthony Johnson, in the amount of $419,192.64, plus postjudgment interest at a rate of 0.695%, compounded annually, running from November 16, 2016 until the date of payment.

IT IS SO ORDERED.
DATED: October 7, 2018

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT

E. Ninth Circuit Memorandum, *Johnson v. STORIX, INC.*, Case No. 16-55439

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY J. JOHNSON, Plaintiff-counter defendant-Appellant	No. 16-55439[1] D.C. No. 3:14-cv-01873-H-BLM
v.	
STORIX, INC., a California Corporation Corporation, Defendant-Appellee-counter-claimant-Appellee.	FILED DEC 19 2017 MOLLY C. DWYER CLERK

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Submitted December 5, 2017[2]
Pasadena, California

Before: D.W. NELSON and REINHARDT, Circuit Judges, and STEEH,[3] District Judge.

Anthony Johnson ("Johnson") appeals the judgment in favor of Storix, Inc. ("Storix") after a 5-day jury trial in his copyright infringement action, denial of his summary judgment motion, denial of his motion for a new trial, and award of attorney's fees to Storix. We review a denial of summary judgment de novo. *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1109 (9th Cir. 2007). For a summary judgment ruling to be appealable after a full trial on the merits, the denial must

---

1 This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

2 The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

3 The Honorable George Caram Steeh III, United States District Judge for the Eastern District of Michigan, sitting by designation.

involve an "error of law that, if not made, would have required the district court to grant the motion." *FBT Productions, LLC v. Aftermath Records*, 621 F.3d 958, 963 (9th Cir. 2010). In reviewing a denial of a motion for a new trial, we review interpretations of the Copyright Act de novo. *See Perfect 10, Inc.*, 488 F.3d at 1109. We review jury instructions de novo for statements of law and under an abuse of discretion standard with respect to their formulation. *SEIU v. Nat'l Union of Healthcare Workers*, 718 F.3d 1036, 1047 (9th Cir. 2013). We also "review a district court's decision to grant or deny attorney's fees under the Copyright Act for abuse of discretion." *Perfect 10, Inc.*, 488 F.3d at 1109. We **AFFIRM** in part, **REVERSE** in part, and **REMAND**.

On March 15, 2004, Johnson signed a 2003 Annual Report ("Annual Report") he personally drafted that memorialized the transfer of "all assets" to Storix. The Annual Report stated: "All assets from Storix Software were transferred to Storix Inc., as of its incorporation as of February 24, 2003."

Johnson argues that the district court erred in denying his motion for summary judgment and motion for a new trial because the Annual Report does not satisfy Section 204(a) of the Copyright Act as a matter of law. The Copyright Act provides that "a transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer is in writing and signed by the owner of the rights conveyed." 17 U.S.C. § 204(a). Section 204(a) can be satisfied by an oral assignment that is later confirmed in writing. *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1156 (9th

Cir. 2010); *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 775 (9th Cir. 1989) ("If an oral transfer of a copyright license is later confirmed in writing, the transfer is valid.").

The writing does not require any "magic words . . . Rather, the parties' intent as evidenced by the writing must demonstrate a transfer of the copyright." *Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 927 (9th Cir. 1999) (citing Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 10.03[A][2] at 10-37 ["As with all matters of contract law, the essence of the inquiry here is to effectuate the intent of the parties."]). As such, the writing does not "have to be the Magna Carta; a one-line pro forma statement will do." *Id.* (citations omitted); *see also SCO Grp., Inc. v. Novell, Inc.*, 578 F.3d 1201, 1212 (10th Cir. 2009) ("Section 204(a), by its terms, imposes only the requirement that a copyright transfer be in writing and signed by the parties from whom the copyright is transferred; it does not on its face impose any heightened burden of clarity or particularity.").

The Annual Report qualified as a "note or memorandum" that was signed by Johnson and memorialized a transfer of assets. *See* 18 U.S.C. § 204(a). Contrary to Johnson's assertions, the form of a signature and contemporaneity of the writing are not dispositive. First, Section 204(a) does not necessitate the form of the signature to be in the transferor's personal capacity. The purpose of Section 204(a)'s writing requirement is to prevent inadvertent transfers and fraudulent claims of copyright ownership. *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1428-29 (9th Cir.

1996). That concern is virtually absent when Johnson himself admitted to writing and signing the Annual Report that memorialized a transfer of at least some assets to his own wholly-owned company. Johnson conceded that a transfer of some assets did occur, including computers, desks, supplies, and "whatever was necessary to continue doing business as Storix, the same thing that I was doing as Storix Software."

Similarly, *Konigsberg Intern. Inc. v. Rice*, 16 F.3d 355 (9th Cir. 1994) does not require a contemporaneous writing under these facts. *Magnuson*, 85 F.3d at 1429 n.1 (stating that the issue in *Konigsberg* was tardiness, not contemporaneousness, and "to the extent that some language in *Konigsberg* might be interpreted as requiring a contemporaneous writing even under the facts of this case, it is clearly dicta."); *see also Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 828 (3d Cir. 2011) ("[T]ext of the statute . . . clearly allows for a subsequent writing to effectuate an earlier oral transfer, it does not specify a time period during which the writing must be consummated."). Unlike the writing in *Konigsberg*, the Annual Report provided a "reference point" to the exact date of the transfer. *See id.* (noting that the problem in *Konigsberg* was that "it was 'not the *type of writing* contemplated by [S]ection 204'" because it did not provide a "reference point for the parties' [] disputes").

Johnson also argues that his motion for a new trial should have been granted because the interpretation of Section 204(a) was not an issue for the jury. But for Johnson's assertion that the term "all assets" did not include the copyright to SBA, the Annual Report satisfied Section 204(a)'s writing requirement. Both parties

offered extrinsic evidence to prove the meaning of "all assets." *See* 2 Patry on Copyright § 5:111 ("After-the-fact writings should serve . . . as a reference point, a springboard from whence the parties' actual intent may be verified . . . Extrinsic evidence of the parties' intent may play an important role."). Extrinsic evidence that is offered to interpret the terms of a writing are for the jury. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1077 (9th Cir. 2010) (When there is "extrinsic evidence supporting competing interpretations of ambiguous contract language the court may not use the evidence to interpret the contract as a matter of law, but must instead render the evidence to the factfinder for evaluation of its credibility"); *see Welles v. Turner Entm't Co.*, 503 F.3d 728, 737 (9th Cir. 2007) (remanding to district court because the intention of parties' copyright transfer was ambiguous, "and because the contract's interpretation may turn on the credibility of extrinsic evidence."). Thus, the jury was properly tasked with interpreting the term at issue.

Given the foregoing, the jury instructions correctly stated that the term "all assets" could include copyright ownership and that the jury could use extrinsic evidence to interpret the meaning of the term. Therefore, the district court did not err in denying Johnson's motion for a new trial on the basis that the jury instructions were an incorrect statement of law.

The district court did not abuse its discretion in awarding fees to Storix because it gave "'substantial weight' to the objective reasonableness of [Johnson's] position but did not rely exclusively on it, and thus the Supreme Court's recent

decision in *Kirtsaeng v. John Wiley & Sons, Inc.* does not require a different result." *Choyce v. SF Bay Area Indep. Media Ctr.*, 669 F.App'x 863, 865 (9th Cir. 2016). The district court properly relied on other factors that outweighed its findings that Johnson's claims were not objectively unreasonable or frivolous: Johnson's motivation, the degree of Defendant Storix's success, and the need to advance considerations of compensation and deterrence. *See Omega S.A. v. Costco Wholesale Com.*, 776 F.3d 692, 695-96 (9th Cir. 2015).

While the district court did not abuse its discretion in choosing to award fees to Storix, we find that the amount of the award was unreasonable. "Even though a district court has discretion to choose how it calculates fees, we have said many times that it abuses that discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011) (citations and quotations omitted); *see also Fox v. Vice*, 563 U.S. 826, 839 (2011) ("The essential goal in shifting fees ... is to do rough justice, not to achieve auditing perfection."). Because Johnson's claims were neither unreasonable nor frivolous, the amount of $543,704 was excessive. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S.Ct. 1979, 1988 (2016) (holding that courts must give substantial weight to the objective reasonableness of losing party's position when awarding fees). Further, Johnson, who is now pro se, is an individual plaintiff, rather than another company. *See Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986) ("The relative financial strength of the parties is a valid consideration" in determining "what amount is reasonable"). "While we do not pass

judgment on what the award should be, § 505 demands that it be reasonable." *Woodhaven Homes & Realty, Inc. v. Hotz*, 396 F.3d 822, 824 (7th Cir. 2005) (quotations omitted); *see also Yellow Pages Photos, Inc. v. Ziplocal, LP*, 846 F.3d 1159, 1165 (11th Cir. 2017) ("At the end of the day, the substantive reasonableness of the amount awarded is the touchstone of our evaluation of a district court's award of fees and costs."). We therefore reverse the fee award and remand to the district court to reconsider the amount. **AFFIRMED in part, REVERSED in part, and REMANDED.** Each party shall bear its own costs.