

No. 19-1244

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IN THE  
**Supreme Court of the United States**

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ANTHONY JOHNSON,

*Applicant,*

v.

STORIX, INC.,

*Respondent.*

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On Application to Stay the Mandate of the  
United States Court of Appeals for the Ninth Circuit

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**APPLICATION FOR A STAY PENDING THE DISPOSITION OF A  
PETITION FOR A WRIT OF CERTIORARI**

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Anthony Johnson  
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## ATTACHMENTS

- Attachment A: Memorandum of the Ninth Circuit Court of Appeals in *Johnson v. Johnson v. STORIX, INC.*, No. 16-55439 (9th Cir. Dec. 19, 2017) (cert. denied.) (Pet. App. 45a)
- Attachment B: Memorandum of the Ninth Circuit Court of Appeals in *Johnson v. STORIX, INC.*, No. 18-56106 (9th Cir. Feb. 5, 2020) (Pet 1a)
- Attachment C: Order of the District Court for the Southern District of California in *Johnson v. STORIX, INC.*, No. 3:14-cv-1873-H-BLM, dated August 7, 2018. (Pet. App. 5a; Exhibit B omitted)
- Attachment D: Second amended judgment of the District Court for the Southern District of California in *Johnson v. STORIX, INC.*, No. 3:14-cv-1873-H-BLM, dated August 7, 2018. (Pet. App. 42a)
- Attachment E: Order of the Ninth Circuit denying a motion to stay the mandate pending filing and disposition of petition for writ of certiorari with the Supreme Court, dated April 29, 2020.

**To the HONORABLE ELENA KAGAN, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:**

In accordance with 28 U.S.C. § 2101(f) and Supreme Court Rules 23 & 24, Plaintiff-Applicant Anthony Johnson (Johnson) respectfully requests an immediate stay of execution of the judgment in Southern District of California Case No. 3:14-cv-01873-H-BLM pending the disposition of a petition for writ of certiorari with this Court. Earlier today, the Ninth Circuit summarily denied Johnson's motion to stay its mandate pending the filing of Johnson's petition and Johnson's amended motion to stay the mandate pending the disposition of the petition after it was filed. Absent relief from this Court, the mandate is scheduled to issue in **seven days**. Petitioner has herein satisfied the requirements of Supreme Court Rule 23 for seeking a stay from a Circuit Justice.

First, there is a reasonable probability the Court will grant Johnson's petition for certiorari. Ordinarily, an unpublished 2-page memorandum affirming a judgment against a *pro se* appellant would weigh against certiorari. But in this case, those factors strongly favor the Court granting certiorari. Johnson will ask the Court to answer an important constitutional question of whether the Ninth Circuit denied his Fifth Amendment right to due process by summarily affirming a district court's order, wherein the district court repeatedly failed to acknowledge any legal arguments or authority contrary to its decision to award unprecedented attorney's fees in a copyright case. The Ninth Circuit panel also affirmed the order following remand without determining if the district court complied with its mandate to

reduce the prior fee award to a reasonable amount based on the facts and circumstances of the case in accordance with this Court's decision in *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng)*, 136 S. Ct. 1979, 579 U.S. \_\_\_, 195 L. Ed. 2d 368 (2016).

Second, Johnson has demonstrated a fair prospect the order of the district court awarding attorney's fee in this case will be reversed. Even after being remanded as unreasonable and excessive, the attorney's fee award against Johnson remains by far the largest against any individual in a copyright case in U.S. history, the only fees awarded against an author of a registered copyright, and the only award against any party with an objectively reasonable case since the Court's decision in *Kirtsaeng*, supra. Importantly, the entire basis and calculation of the award was based on Johnson having sent an email while the copyright case was pending threatening litigation against Storix's management on unrelated matters and asserting his rights under the Copyright Act. Never have copyright attorney's fees been used to punish a litigant for exercising his valid First Amendment rights to petition and free speech.

Lastly, neither party will suffer any harm if the Ninth Circuit's mandate is stayed because the amended judgment following remand awarding attorney's fees and costs under the Copyright Act § 505 in the amount of \$419,192.64 is currently secured by a supersedeas bond in the amount of \$427,932.83 to cover the entire award plus three years of post-judgment interest. However, if the mandate issues, Johnson's supersedeas bond will be released to Defendant-Respondent Storix, Inc.

and Johnson will have very little hope of recovering the funds if the judgment is reversed or remanded. Johnson respectfully and urgently requests that this Court stay the Ninth Circuit's mandate before **May 7, 2020** when it is scheduled to be released.

## I. STATEMENT OF FACTS

In December 2015, the district court entered judgment based on a jury's verdict that Johnson implicitly transferred ownership of his 1999 registered copyrights to Storix when he incorporated the company in 2003. (See *Johnson v. STORIX, INC.*, 9th Cir. Case No. 18-56106, ROA No. 2 at p. 3.)<sup>1</sup> The court further found Johnson was a "work for hire" during the eight years in which he was the Storix's sole shareholder, officer and director, and thus Storix also owned all his derivative works. (*Id.* at p. 10, citing *Johnson v. STORIX, INC.*, No. 3:14-cv-1873-H-BLM ("Dist. Ct.") Doc. No. 160.)

The district court deferred its decision to award attorney's fees until after this Court's ruling in *Kirtsaeng*, supra. In August 2016, the court found that an email in which Johnson threatened a state lawsuit against Storix's management on unrelated matters and asserted his rights under the Copyright Act while the litigation was pending was "inappropriate conduct [that] should be deterred." (Attachment C, Exhibit A at p. 11.) The court thereby ordered Johnson to pay all Storix's fees incurred after the date of his email. (*Id.*, Exhibit B at p. 9.) The first

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<sup>1</sup> The Register of Actions in 9th Cir. Case No. 18-56106 will hereafter be referred to as "ROA".

amended judgment awarded Storix attorney's fees and costs in the amount of **\$555,119**. (Dist. Ct. Doc. Nos. 230 & 246.)

The court granted in part Johnson's motion to stay execution of the judgment pending appeal upon posting of a supersedeas bond for the full judgment amount. (Dist. Ct. Doc. No. 256.) Johnson sold his home to pay the bond and was thereafter unable to afford an attorney to represent him in both the appeal and concurrent state litigation Storix brought against him based on the same email. (Dist. Ct. Doc. No. 288 at pp. 16-19; Doc. No. 2 at pp. 23-25.) Johnson was therefore *pro se* in filing his reply brief and has since been self-represented in these proceedings.

In *Johnson v. STORIX, INC.*, 9th Cir. Case No. 16-55439 ("*Johnson I*"), Johnson argued that Storix possessed no written transfer agreement required by the Copyright Act and that the "work for hire" doctrine does not apply to a sole owner of a company. (*Johnson I*, Doc. No. 25.) Johnson further appealed the attorney's fee award because his case was objectively reasonable and not frivolous, the court's award of fees was based on erroneous conclusions about the Copyright Act's need for deterrence contrary to the guidance in *Kirtsaeng*, supra, 136 S. Ct. at 1987. The Ninth Circuit panel affirmed the district court's denial of Johnson's summary judgment and new trial motions without addressing the above legal issues. The panel also didn't consider whether an attorney's fee award can be based on conduct unrelated to the litigation, but nonetheless reversed the attorney's fee award as unreasonable, and remanded the decision to the district court with



instructions to reconsider the amount based on all facts and circumstances of the case in accordance with *Kirtsaeng*, supra. (Attachment A at p. 8.)

On remand, Johnson argued clear errors of fact and law in the basis and calculation of the prior fee award, including that the fees were entirely based on *protected* conduct unrelated to the copyright litigation. (Dist. Ct. Doc. Nos. 288 & 311.) The court reduced the fees to **\$419,192.64** to comply with the directive to reduce the fees, but the order made no reference to any of Johnson's arguments, and the award was still based entirely on the same protected conduct. (*See* Attachment C.) The Second Amended Judgment awarded total fees and costs of \$427,932.83 and added interest from the date of the original judgment. (Attachment D.) The court further ordered Johnson to post a second bond for the new judgment amount pending appeal *before* it would release the bond from the reversed judgment. (Dist. Ct. Doc. No. 313.)

In *Johnson v. STORIX, INC.*, 9th Cir. Case No. 18-56106 ("*Johnson II*"), Johnson raised the issues of (1) whether the attorney fee award can be based on issues unrelated to the copyright litigation and having no effect on its attorney's fees, (2) whether the district court erred in deciding an amount of fees sufficient to deter Johnson from exercising his First Amendment rights to free speech and petition on unrelated matters, and (3) whether the district court failed to consider the reasonableness of the amount remanded for reconsideration based on the facts and circumstance of the case. (ROA No. 2 at pp. 1-2.) Johnson explicitly stated in his briefs that his arguments were *not* directed to the district court's decision to

award fees but to the legal and factual basis and calculation of the award *amount*. He therefore concluded that, although the facts and controlling law dictate that no fees should have been awarded, the procedural history dictates that a nominal fee award is warranted. (ROA No. 2 at pp. 23, 35; ROA No. 10 at p. 4.)

The Ninth Circuit panel affirmed the district court's order in a 2-page memorandum stating, "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" (Attachment B; italics added.) The panel therefore affirmed the entire fee award "because this court affirmed the district court's decision to award fees and remanded only as to the amount awarded" without reference to any facts or arguments in Johnson's briefs specifically directed to the award amount. (*Id.*) The panel's only finding on an argument Johnson raised on appeal was that the district court did not abuse its discretion in adding interest to the judgment. (*Id.*)

Johnson filed a petition for panel rehearing, arguing that the panel failed to address any of his arguments directed to the award amount. (*Johnson II*, Doc. No. 16.) The petition was summarily denied. (*Johnson II*, Doc. No. 16.) The next day, Johnson timely filed a motion to stay the mandate with the Ninth Circuit pending filing of a petition for writ of certiorari with this Court. (*Johnson II*, Doc. No. 19.) After Johnson filed the Petition with this Court, he filed an amended motion with the Ninth Circuit to stay the mandate pending disposition of the petition. (*Johnson II*, Doc. No. 22.) Both motions were denied on April 29, 2020. (Attachment E.)

## II. REASONS FOR GRANTING THE STAY

“To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.” *Hollinsworth v. Perry*, 558 U.S. 183, 190 (2010). These standards are readily satisfied in this case.

### A. There Is a Reasonable Probability This Court Will Grant Certiorari and Reverse the Judgment Below

#### 1. Johnson Raises an Important Constitutional Questions Warranting the Court’s Review

The most compelling reason for granting Johnson’s petition for Certiorari is found in Supreme Court Rule 10(a), which indicates certiorari is warranted when “a United States court of appeals has entered a decision ... so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.” Johnson presents an important question of whether refusal by *both* the district and appellate courts to address dispositive legal arguments constitutes a denial of his Fifth Amendment right to due process. That denial of due process was amplified by the Ninth Circuit’s failure to determine if the district court complied with its mandate on remand to reduce the attorneys’ fees to a reasonable amount in accordance with *Kirtsaeng*, *supra*. Resolving the question of denial of Fifth Amendment rights will result in this Court either remanding the decision to the Ninth Circuit for further consideration or reversing the underlying district court judgment based on its clear

violation of Johnson's First Amendment rights by explicitly awarding attorney's fees to punish him for threatening litigation and asserting his rights under the Copyright Act.

The Ninth Circuit panel upheld the second judgment without addressing Johnson's arguments by instead finding that Johnson was challenging the district court's *decision* to award fees rather than the *amount* of fees remanded for reconsideration. This is nonsensical since an unlawful decision to use attorney's fees to chill a litigant's First Amendment rights is certainly relevant to the amount of fees awarded. Nonetheless, Johnson explicitly stated in his brief (supported by reference to the transcript of the remand hearing) that his arguments were *not* directed to the decision to award fees but to the unreasonableness of the amount. Even so, the panel's refusal to consider Johnson's arguments was contrary to the Ninth Circuit's own directive to liberally construe the pleadings of a pro se litigant. See *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984). Furthermore, the panel affirmed the order following remand without determining if the district court complied with its mandate in *Johnson I* to reduce the fees to a reasonable amount – a determination that could not be reached without addressing Johnson's legal and factual arguments.

The Ninth Circuit was required to review *de novo* any issues of law and mixed questions of fact and law, including any legal analysis pertaining to attorneys' fees. *Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1216 (9th Cir. 1997); *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042

(9th Cir. 2000); *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The Ninth Circuit avoided reviewing a clearly erroneous decision by asserting a factually incorrect reason, unsupported by the record, to simply ignore all arguments raised on appeal, thereby deferring to the district court's findings which should have been reviewed as if no decision had previously been rendered. See *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011); *Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008). In this case, the Ninth Circuit deferred to the entire order and its written decision contained no findings on any legal issues raised on appeal.

The Court should determine the minimal level of reasoning required to prevent appellate courts from dismissing meritorious appeals by simply ignoring legal issues and arguments the lower court also refused to acknowledge. Fed. R. App. Proc. 36 allows appellate courts to issue a decision "without an opinion", but the Ninth Circuit Local Rule 36-1 requires a "reasoned disposition." While summary opinions may be considered an implied agreement with the lower court's decision, it cannot be inferred from such opinions that a circuit court agreed with the lower court on important issues and arguments that do not appear in the lower court's order. A litigant, especially when acting *pro se*, has been denied due process when he took every possible step to raise and argue an important legal issue only to have it entirely ignored by *both* the district and appellate courts required by their own rules to provide a reasoned disposition.

Such unfair procedural tactics used to support erroneous judgments not only deprives a party due process but prevents further review because this Court cannot find written orders containing no reference to the underlying issues and arguments precedential or in conflict with other decisions. Requiring appellate courts to provide a single sentence indicating the reason for its decision on each legal argument – even to simply acknowledge that it deferred to or agreed with the lower court’s decision – will better ensure parties are afforded a fair hearing, reduce the number of petitions for rehearing and certiorari, and aid in restoring the public’s eroding trust in the legal system.

Even if the Court declines to require minimal reasoning in written decisions, it should nonetheless reverse the Ninth Circuit’s decision in order to provide guiding precedent that: (1) Circuit courts cannot summarily affirm a judgment in which the lower court failed to address the same legal arguments raised on appeal, and (2) Circuit courts cannot affirm an order following a remand without determining if the lower court complied with its mandate.

## **2. There is a Fair Prospect the Court Will Reverse the Judgment**

The district court ignored all facts, argument and authority that should have precluded the attorney fee award. Even so, Johnson specifically asked the district court on remand to award only a *nominal amount* to comply with the Ninth Circuit’s mandate to reduce the fees to a reasonable amount.

Johnson argued on remand and on appeal that the district court specifically awarded fees to punish Johnson for (1) exercising his First Amendment rights to

free speech and petition on unrelated matters and (2) for asserting his rights under the Copyright Act before the court decided he implicitly transferred all copyrights to Storix twelve years earlier. The court expressed no reason for awarding attorney's fees related to the copyright litigation, finding that nearly \$420,000 in fees were necessary to deter Johnson from threatening litigation and to punish him for exercising his rights under the Copyright Act while the copyright litigation was pending. Every decision of the district court was unprecedented, based its *sua sponte* arguments and factual conclusions unsupported by the record, and contrary to the essential goals of the Copyright Act. See *Kirtsaeng, supra*, 136 S. Ct. 1979; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S. Ct. 1023 (1994).

**B. Enforcement of the Mandate Will Inflict Irreparable Injury**

It should be of relatively little importance to Storix that Johnson's bond be released pending a decision of this Court on Johnson's petition. But Storix's persistent mismanagement and waste of corporate resources throughout five years of needless litigation against Johnson in both state and federal courts have rendered the company insolvent. If Johnson's bond is released to Storix, it will be spent long before this Court can decide Johnson's petition and Johnson will have no hope of recovering the funds even if the decision in this case is reversed or remanded.

There is good cause to stay the Ninth Circuit's mandate and no harm to any party by allowing the fee award to remain in the existing supersedeas bond pending the disposition of Johnson's petition for writ of certiorari with this Court.

### III. CONCLUSION

Based on the foregoing, the Court should order the Ninth Circuit to stay its mandate pending the filing and disposition of Johnson's petition for writ of certiorari.

Dated: April 29, 2020

Respectfully Submitted,

s/Anthony Johnson

Anthony Johnson

*Pro Se Petitioner*

1728 Griffith Avenue

Las Vegas, NV 89104

(619) 246-6549



## PROOF OF SERVICE

I, Anthony Johnson, do swear or declare that on this date, April 29, 2020, as required by Supreme Court Rule 29, I have served the enclosed APPLICATION FOR STAY OF MANDATE on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of the attorneys for Appellee Storix, Inc. served are as follows:

Kendra J. Hall  
Paul A. Tyrell  
Sean Sullivan  
PROCOPIO, CORY, HARGREAVES & SAVITCH LLP  
525 B Street, Suite 2200  
San Diego, CA 92101  
Telephone: 619.238.1900

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 29, 2020.

  
(Signature)

## INDEX OF APPENDICES

Attachment	Document	Page
A	Memorandum of the Ninth Circuit Court of Appeals in <i>Johnson v. Johnson v. STORIX, INC.</i> , No. 16-55439 (9th Cir. Dec. 19, 2017) (cert. denied.)	A1 (Pet. 45a)
B	Memorandum of the Ninth Circuit Court of Appeals in <i>Johnson v. STORIX, INC.</i> , No. 18-56106 (9th Cir. Feb. 5, 2020)	A9 (Pet. 1a)
C	Order of the District Court for the Southern District of California in <i>Johnson v. STORIX, INC.</i> , No. 3:14-cv-1873-H-BLM, dated August 7, 2018. (Exhibit B omitted)	A12 (Pet 5a)
D	Second amended judgment of the District Court for the Southern District of California in <i>Johnson v. STORIX, INC.</i> , No. 3:14-cv-1873-H-BLM, dated August 7, 2018.	A42 (Pet. 42a)
E	Order of the Ninth Circuit denying a motion to stay the mandate pending filing and disposition of petition for writ of certiorari with the Supreme Court, dated April 29, 2020.	A45

**FILED**

DEC 19 2017

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

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. 16-55439

D.C. No.  
3:14-cv-01873-H-BLM

MEMORANDUM\*

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

Submitted December 5, 2017\*\*  
Pasadena, California

Before: D.W. NELSON and REINHARDT, Circuit Judges, and STEEH,\*\*  
District Judge.

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\* 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).

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

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 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.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 5 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

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

MEMORANDUM\*

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

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\* 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).

(9th Cir. 2017) (“*Johnson I*”).<sup>1</sup>

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.

*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

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<sup>1</sup> The prior panel declined this appeal as a comeback.

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.**

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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 ANTHONY JOHNSON,

12 Plaintiff,

13 v.

14 STORIX, INC., a California corporation,

15 Defendant.  
16  
17

Case No.: 3:14-cv-01873-H-BLM

**ORDER AWARDING ATTORNEYS'  
FEES ON REMAND**

[Doc. No. 285.]

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

27 After receiving the Ninth Circuit’s mandate, (Doc. No. 283), the Court ordered the  
28 parties to submit supplemental briefing on the amount of attorneys’ fees to be awarded to

1 Storix. (Doc. No. 284.) After receiving and reviewing that briefing, (see Doc. Nos. 285,  
 2 288, 289), the Court held a hearing on the matter on August 6, 2018. Johnson appeared on  
 3 his own behalf, while Storix was represented by Paul A. Tyrell and Sean M. Sullivan. The  
 4 Court now turns to the sole remaining issue on remand: the amount of reasonable attorneys'  
 5 fees to be awarded to Storix.

### 6 Background

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

#### 12 **I. The Court's Prior Fee Orders**

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

19 On June 16, 2016, the Supreme Court issued an opinion clarifying the standard for  
 20 awarding fees under the Copyright Act. See Kirtsaeng v. John Wiley & Sons, Inc., 136 S.  
 21 Ct. 1979 (2016). The Court then ordered the parties to file supplemental briefing  
 22 addressing Kirtsaeng's impact on Storix's fees motion. (Doc. No. 215.) Pursuant to the  
 23 Court's instructions, the parties each filed two supplemental memoranda. (Doc. Nos. 217,  
 24 218, 223, 224.) On August 15, 2016, the Court held a second hearing on Storix's fee  
 25 motion. (Doc. No. 229.)

26 On August 17, 2016, the Court granted Storix's fee request in part and denied it in  
 27 part. (Doc. No. 230.) In accordance with Kirtsaeng, the Court considered "Johnson's  
 28 motivations, the reasonableness of [his] positions, the degree of . . . Storix's success, the

1 need to advance considerations of compensation and deterrence, and the frivolousness of  
2 . . . Johnson's litigation positions and tactics." (*Id.* at 4.) With respect to Johnson's  
3 motivations in bringing this suit, the Court noted that "Johnson took a number of actions  
4 demonstrating that his motivation was not simply to win damages for alleged copyright  
5 infringement . . . but also to wrest control of [Storix] from its majority shareholders and to  
6 force the company to 'close its doors.'" (*Id.* at 5–6 (citation omitted).) Specifically, the  
7 Court recounted an email Johnson sent to several Storix directors and employees entitled  
8 "Buckle up boys!" where Johnson stated:

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

18 (Doc. No. 66-1, Huffman Decl. Ex. A, at 5–9.) The Court also noted that Johnson took  
19 other actions like sending an "announcement to . . . Storix's customers in which [Johnson]  
20 demanded that the customers cease paying . . . Storix for the use of its software," and  
21 sending "an email to one of . . . Storix's employees declaring a hope that [Johnson's]  
22 announcement to the company's customers would result in . . . Storix running out of money  
23 so that it would be unable to continue defending the lawsuit" and threatening "litigation  
24 that would cause the employee to lose his home." (Doc. No. 230 at 5–6.)

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

28       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



1 incorporation of February 24, 2003.’ Plaintiff Johnson survived summary  
2 judgment by arguing that the Annual Report did not memorialize his intent to  
3 transfer the copyright in SBAdmin to Defendant Storix.

4 At trial, Defendant Storix adduced overwhelming evidence demonstrating that  
5 the Annual Report did in fact memorialize Plaintiff Johnson’s intent to  
6 transfer the copyright in SBAdmin. For example, shortly after the 2003  
7 incorporation, the ‘clickwrap’ license for SBAdmin stated, ‘Copyright (c)  
8 1999-2003 Storix, Inc.’ On January 29, 2004, Plaintiff Johnson sent an email  
9 insisting that a distributor refrain from suppressing a copyright statement in  
10 the software reading, ‘Copyright (c) 1999-2003 Storix, Inc.’ On February 17,  
11 2004, and on March 7, 2007, Plaintiff Johnson signed distribution agreements  
12 that stated, ‘STORIX shall retain and own all right, title and interest in  
13 [SBAdmin] . . . [and] reserves to itself all . . . benefits afforded under U.S.  
14 copyright law . . . .’

15 Significantly, on January 24, 2006, Plaintiff Johnson stated in an email to a  
16 German lawyer who was advising Storix in a trademark dispute, ‘It is not  
17 entirely possible for us to completely abolish the use of STORIX with our  
18 product, as it is the company that owns the copyright to the product,  
19 documentation, web site and support.’ Plaintiff Johnson did not state that  
20 Defendant Storix was using the copyright pursuant to a license.

21 Similarly, on March 26, 2007, Plaintiff Johnson sent an email to his  
22 employees instructing them to include language on the Storix website and  
23 software documentation that read, ‘Copyright Storix, Inc. 1999-2007 USA.’  
24 On August 20, 2010, Plaintiff Johnson sent an email to the Oracle Corporation  
25 that stated, ‘The company acquiring Storix will gain the most comprehensive  
26 disaster recovery product available for any operating system on the market.’  
27 On August 26, 2010, Plaintiff Johnson made a submission to the IBM  
28 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.<sup>1</sup>

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

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<sup>1</sup> 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.

1 secretly communicate with him about what was happening inside the  
2 company and to delete their correspondence. That email also indicated that  
3 Plaintiff Johnson had been working on revising the SBAdmin software and  
4 that he had a marketable product. Additionally, the email stated, '[Storix's  
5 leadership] tell you they now own the copyright, but they don't.' In light of  
6 the jury's verdict stating that Defendant Storix owns all copyrights to  
7 SBAdmin, Defendant Storix sent a cease and desist letter to Plaintiff Johnson  
8 demanding that he cease copying, distribution, modification, or sale of any  
9 version of SBAdmin. On January 22, 2016, Plaintiff Johnson stated that he  
10 would not return materials related to SBAdmin and declined to respond to the  
11 demand that he cease copying, distribution, modification, or sale of SBAdmin.

9 Plaintiff Johnson's pre-judgment litigation tactics should also be deterred. It  
10 was inappropriate for Plaintiff Johnson to tell Defendant Storix's shareholders  
11 to 'get the [expletive] out' and to attempt to coerce them into surrendering  
12 control of the company. It was inappropriate for Plaintiff Johnson to demand  
13 that Defendant Storix's customers stop paying for the use of its software in an  
14 attempt to prevent Defendant Storix from having enough money to continue  
15 defending the lawsuit. It was also inappropriate for Plaintiff Johnson to  
16 threaten Defendant Storix's directors with the loss of their homes while he  
17 was telling the customers to stop paying Storix to undermine the company.

15 (Id. at 10–11 (citations omitted).)

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

19 Taking all of these factors together, the Court concluded that an award of attorneys'  
20 fees to Storix was appropriate under the circumstances. The Court concluded that  
21 "Johnson's motivation, the degree of . . . Storix's success, and the need to advance  
22 considerations of compensation and deterrence all weigh[ed] heavily in . . . Storix's favor."  
23 (Id. at 13.) The Court noted that these factors outweighed the fact that Johnson's case  
24 survived summary judgment, even after the Court gave substantial weight to that fact. (Id.)  
25 See Kirtsaeng, 136 S. Ct. at 1988–89 (holding that "a court may order fee-shifting because  
26 of a party's litigation misconduct, whatever the reasonableness of his claims or defenses").  
27

28 After deciding that a fee award was warranted, the Court exercised its discretion to

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

12 After reviewing the parties' supplemental submissions, the Court issued a final  
 13 Order awarding Storix \$543,704, less than half of the fees and costs it had originally  
 14 requested. (Doc. No. 241.) The Court found that Storix's timesheets were professional  
 15 and detailed, that Storix's attorneys had not spent excessive time or used excessive staff  
 16 litigating the case, and that Johnson was not entitled to a fee offset in light of the Storix  
 17 shares that he owns. (*Id.* at 5–9.) The Court further awarded fees incurred for the litigation  
 18 necessary to resolve Storix's attorneys' fees motion. (*Id.*) The Court entered an amended  
 19 judgment reflecting the fee award on November 16, 2016.<sup>2</sup> (Doc. No. 246.)

## 20 **II. The Ninth Circuit's Opinion**

21 Johnson appealed to the Ninth Circuit, and that court affirmed in part and reversed  
 22 in part the Court's judgment. 716 F. App'x at 630. The Court of Appeals rejected each of  
 23 Johnson's challenges to the jury's verdict, and held that the Court "did not abuse its  
 24 discretion in choosing to award fees to Storix[.]" *Id.* at 631–32. However, the panel further  
 25

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26  
 27 <sup>2</sup> The Court stayed execution of the judgment pending appeal on the condition that Johnson agree  
 28 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.)

1 held “that the amount of the award was unreasonable.” Id. at 632. The panel observed that  
 2 because “Johnson’s claims were neither unreasonable nor frivolous, the amount of  
 3 \$543,704 was excessive.” Id. The panel further observed that Johnson “is an individual  
 4 plaintiff, rather than another company,” and that the “‘relative financial strength of the  
 5 parties is a valid consideration’ in determining ‘what amount is reasonable.’” Id. (quoting  
 6 Lieb v. Topstone Indus., Inc., 788 F.2d 151, 156 (3d Cir. 1986)). While the Ninth Circuit  
 7 declined to “‘pass judgment on what the award should be,’” it remanded with instructions  
 8 for the Court to “reconsider the amount.” Id. (quoting Woodhaven Homes & Realty, Inc.  
 9 v. Hotz, 396 F.3d 822, 824 (7th Cir. 2005)).

### 10 **III. The Parties’ Arguments**

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

16 As a preliminary matter, the Court denies Johnson’s request that no fees be awarded.  
 17 The Court previously decided that an award of attorneys’ fees to Storix was warranted on  
 18 the facts of this case, a conclusion that the Ninth Circuit affirmed. 716 F. App’x at 632.  
 19 The Ninth Circuit’s limited remand “to reconsider the amount” of fees to be awarded to  
 20 Storix, id., is not capacious enough to permit the Court to reexamine whether to award fees  
 21 at all.<sup>3</sup> See, e.g., In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (“When a case  
 22 has been once decided by this court on appeal, and remanded to the circuit court, whatever  
 23 was before this court, and disposed of by its decree, is considered as finally settled . . . .  
 24 [The lower] court cannot vary it, or examine it for any other purpose than execution; or  
 25 give any other or further relief; or review it, even for apparent error, upon any matter  
 26

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27 <sup>3</sup> The Court recognizes its discretion to award a low or nominal sum of attorneys’ fees. However,  
 28 as explained throughout this Order, the Court concludes that a minimal fee award would be inappropriate  
 in light of the facts of this case.

1 decided on appeal . . . .”); Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1172 (9th Cir.  
 2 2006) (“[W]e have repeatedly held, in both civil and criminal cases, that a district court is  
 3 limited by this court’s remand in situations where the scope of the remand is clear.”);  
 4 Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists, 422  
 5 F.3d 949, 966 (9th Cir. 2005).

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

## 14 Discussion

### 15 **I. Attorneys’ Fees**

16 The Copyright Act allows a district court, “in its discretion,” to award a reasonable  
 17 attorney’s fee to the prevailing party” in a copyright case. 10 U.S.C. § 505. “When  
 18 calculating the amount of attorney fees to be awarded in a litigation, the district court  
 19 applies the lodestar method, multiplying the number of hours reasonably expended by a  
 20 reasonable hourly rate.” Ryan v. Editions Ltd. W., Inc., 786 F.3d 754, 763 (9th Cir. 2015).  
 21 “When a party seeks an award of attorneys’ fees, that party bears the burden of submitting  
 22 evidence of the hours worked and the rate paid. In addition, that party has the burden to  
 23 prove that the rate charged is in line with the prevailing market rate of the relevant  
 24 community.” Carson v. Billings Police Dep’t, 470 F.3d 889, 891 (9th Cir. 2006) (citations  
 25 and quotation marks omitted). The Court may adjust the lodestar figure in light of twelve  
 26 factors:

- 27 (1) the time and labor required; (2) the novelty and difficulty of the questions  
 28 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.<sup>4</sup> 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).

<sup>4</sup> The Court attaches its prior Orders to this Order as Exhibits A and B, respectively.

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

7 Moreover, the Ninth Circuit ordered the Court to use an essentially equitable  
 8 approach in determining Storix's fees—"to do rough justice, not to achieve auditing  
 9 perfection." 716 F. App'x at 632 (citation and internal quotation marks omitted). A  
 10 percentage based approach permits the Court to take into account the objective  
 11 reasonableness of Johnson's claims and his status as an individual without unfairly  
 12 impugning the work done by Storix's attorneys.

13 The Court concludes that reducing Storix's fees by 25% is appropriate. Although  
 14 Johnson is an individual now proceeding pro se, he was represented by counsel during all  
 15 proceedings for which the Court awarded attorneys' fees.<sup>5</sup> Further, while Johnson's claims  
 16 were reasonable enough to survive summary judgment, Johnson's conduct during this  
 17 litigation went well beyond what was necessary to protect his asserted legal interests.  
 18 There is simply no justification for Johnson's decisions to send threatening emails to Storix  
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20 <sup>5</sup> Johnson was originally represented by Gary Eastman of Eastman & McCartney, LLP. On January  
 21 12, 2016, the Court granted Johnson's motion to substitute Andrew Skale of Mintz Levin Cohn Ferris  
 22 Glovsky & Popeo, PC, a large 500-attorney law firm ranking in the Am Law 100, as his attorney of record.  
 23 (Doc. Nos. 172, 173.) On May 5, 2017, Johnson parted ways with his attorneys from Mintz Levin, (Doc.  
 24 Nos. 265, 266), and subsequently retained Barnard F. King, III as his counsel of record. (Doc. No. 267.)  
 25 Johnson began appearing pro se in this Court on March 28, 2018. (Doc. Nos. 280, 281.) The Court  
 26 awarded attorneys' fees for litigation that took place between October 6, 2015 and November 16, 2016,  
 27 when Johnson was variously represented by Eastman & McCartney and Mintz Levin, respectively.

28 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 post-  
 trial 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 high-  
 end legal representation post-trial undercuts any argument that the fees Storix requests are unreasonably  
 inflated.



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 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,


1 785 F.2d 835, 842 (9th Cir. 1986). “Where a single item such as attorneys’ fees is reduced  
2 on appeal, the district court’s determination should be viewed as correct to the extent it was  
3 permitted to stand, and interest on a judgment thus partially affirmed should be computed  
4 from the date of its initial entry.” Perkins v. Standard Oil Co. of Cal., 487 F.2d 672, 767  
5 (9th Cir. 1973). Accordingly, the Court awards Storix post-judgment interest on the  
6 reduced attorneys’ fees award at a rate of 0.695% running from November 16, 2016 until  
7 the date of payment. The interest shall be compounded annually. 28 U.S.C. § 1961(b).

8 **Conclusion**

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

13 **IT IS SO ORDERED.**

14 DATED: August 7, 2018

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16 MARILYN D. HUFF, District Judge  
17 UNITED STATES DISTRICT COURT  
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# EXHIBIT A

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10 **UNITED STATES DISTRICT COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**  
12

13 ANTHONY JOHNSON,  
14 Plaintiff and Counter-Defendant,  
15 v.  
16 STORIX, INC., a California Corporation,  
17 Defendant and Counter-Claimant.  
18

Case No.: 3:14-cv-1873-H-BLM

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR ATTORNEYS' FEES  
AND COSTS**

[Doc. No. 165]

19 On August 8, 2014, Plaintiff and Counter-Defendant Anthony Johnson ("Plaintiff  
20 Johnson") filed a complaint alleging copyright infringement of a software program. (Doc.  
21 No. 1.) On September 19, 2014, Defendant and Counter-Claimant Storix, Inc. ("Defendant  
22 Storix") filed an answer and counterclaim seeking a declaratory judgment that it did not  
23 infringe any copyright and that it owned all copyrights in the software. (Doc. No. 5.) On  
24 December 8, 2015, the action came before the Court for a jury trial. (Doc. No. 142.) On  
25 December 15, 2015, the jury returned a verdict in favor of Defendant Storix. (Doc. No.  
26 160.) On December 18, 2015, the Court entered judgment in favor of Defendant Storix  
27 and awarded costs to Defendant Storix as provided by law. (Doc. No. 164.) On January  
28 4, 2016, Defendant Storix filed its bill of costs. (Doc. No. 166.) On January 25, 2016, the