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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., et al.,

Plaintiffs,

v.

HATHITRUST, et al.,

Defendants.

Case No. 11-cv-6351(HB)

REPLY IN SUPPORT OF DEFENDANT INTERVENORS' MOTION FOR COSTS AND ATTORNEYS' FEES

To protect their distinct and substantial interest in accessing the HathiTrust Digital Library ("HDL"), the National Federation of the Blind, Georgina Kleege, Blair Seidlitz, and Courtney Wheeler (collectively "NFB") sought to intervene in this case. Had plaintiffs obtained

their requested relief (impoundment and sequestration of the HDL), blind students and scholars would have lost their only means of equal access to a comprehensive collection of university library texts—access that was already in place at the University of Michigan and that was on the near horizon at other HDL institutions. Plaintiffs did not contest NFB's grounds for intervention. Upon intervening, NFB became a party to the litigation. And upon the Court's issuance of its Opinion & Order on October 10, 2012, NFB secured a clear ruling that creating a digital collection for use by the blind is a fair use and that educational entities with such collections may, under the Chafee Amendment, choose to lawfully distribute these electronic texts to all blind Americans. Accordingly, NFB is now a prevailing party, fully entitled to an award of attorneys' fees and costs under 17 U.S.C. § 505.

Plaintiffs incorrectly assert that NFB is not a prevailing party by virtue of its status as an intervenor. Plaintiffs offer no legal authority, however, supporting their sweeping proposition that how a party enters a case bears on whether it can be deemed a prevailing party entitled to attorneys' fees. To the contrary, in a variety of fee-shifting cases, courts routinely award fees to intervenors who have prevailed.[1] In *Wilder v. Bernstein*, for example, the United States Court of Appeals for the Second Circuit held that intervening parties in civil rights cases are entitled to attorneys' fees if they prevail in the litigation by vindicating their rights.[2] Similarly, in awarding fees to the intervening plaintiffs in *Shaw v. Hunt*, the United States Court of Appeals for the Fourth Circuit noted that "persons within the generic category of plaintiff-intervenors have often

[1] *See New Jersey v. E.P.A.*, 663 F. 3d 1279, 1280-82 (D.C. Cir. 2011) (holding that intervenor party was entitled to an award of attorneys' fees as the prevailing party); *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 421 (7th Cir. 2005) (same); *Shaw v. Hunt*, 154 F.3d 161, 164 (4th Cir. 1998) (same); *Hastert v. Illinois State Bd. of Election Comm'rs*, 28 F.3d 1430, 1441 (7th Cir. 1993) (same); *Wilder v. Bernstein*, 965 F.2d 1196, 1204 (2d Cir. 1992) (en banc) (same); *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1350 (9th Cir. 1980) (same).
[2] 965 F.2d at 1204.

been found by courts to fit within the rubric 'prevailing party' for fees purposes."[3] The Fourth Circuit explained that intervenors, both permissive and as of right, "appear in the Federal Rules under the general heading of 'Parties,' *see* FED. R. CIV. P. 24(a) & (b), and the case law treats them as such."[4] The Supreme Court has noted that "intervenors are considered parties" as well.[5] For this reason, when the Second Circuit considered whether intervenor plaintiffs in a copyright case were entitled to an award of attorneys' fees, the fact that the plaintiffs had entered the case through intervention did not enter into the Second Circuit's analysis at all.[6] Indeed, 17 U.S.C. § 505 draws no distinction between the types of parties that may be awarded fees upon prevailing in a copyright case.

Plaintiffs also rely on case law explaining that a party only prevails when there has been a "judicially sanctioned change in the legal relationship of the parties."[7] Plaintiffs blithely conclude that "because there was no judicially sanctioned change in the legal position of the parties," NFB is not a prevailing party.[8] Plaintiffs' conclusion is both absurd and wholly inconsistent with the Court's Opinion & Order. Just as the University Defendants are prevailing parties, so, too, were intervenors. Defendants who win on the merits have prevailed in that questions as to plaintiffs' entitlement to relief are resolved in favor of defendants. Any alternative understanding of what it means to prevail would result in defendants never being entitled to attorneys' fees.

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[3] 154 F.3d at 164.
[4] *Id.* at 165.
[5] *Diamond v. Charles*, 476 U.S. 54, 68 (1986)
[6] *See Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 01-7850, 2002 WL 1583912 (2d Cir. July 17, 2002) (Summary Order).
[7] Pls.' Opp'n to Defs.' Fee Mot. at 20 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001)).
[8] *Id.*

Because this Court has held that "[t]he provision of equal access to copyrighted information for print-disabled individuals is mandated by the ADA and the Rehabilitation Act of 1976" and that "[t]he provision of access to previously published non-dramatic literary works within the HDL fits squarely within the Chafee Amendment," there has been a judicially sanctioned change in the legal relationship between plaintiffs and NFB.[9] Prior to the Court's order, the legality of blind individuals' access to the HDL was in question. Now, this Court has established that blind individuals' access to the HDL is protected under the ADA, the Rehabilitation Act, fair use, and the Chafee Amendment and that plaintiffs are not entitled to their requested relief. The change in the legal relationship between NFB and plaintiffs could not be clearer.

The rationale behind awarding fees and costs to prevailing defendants in copyright cases holds true for NFB in this case as well. As the Supreme Court has explained, awarding attorneys' fees to prevailing defendants encourages "defendants who seek to advance a variety of meritorious copyright defenses" to litigate them, and in doing so, help clarify copyright law, advancing its "purpose of enriching the general public through access to creative works."[10] In the present case, NFB's defense greatly advanced the public interest by clarifying the interaction between civil rights and copyright law and by ensuring that the revolutionary promise of the HDL is available to blind individuals.

Contrary to plaintiffs' assertions otherwise, NFB's efforts in this litigation were not duplicative. Only NFB argued that blind individuals' access to the HDL was legally protected

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[9] Op. at 22.

[10] *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *see also* Peter Jaszi, *505 And All That—The Defendant's Dilemma*, 55 Law & Contemp. Probs. 107, 111-12 (1992) (arguing that same standard for awarding fees should be applied to both plaintiffs and defendants in copyright cases because meritorious copyright defenses advance the public interest by demarcating the contours of copyright law).

under the ADA and Rehabilitation Act. Furthermore, while the Library Defendants only addressed the Chafee Amendment briefly in their reply memorandum in support of summary judgment, NFB fully briefed the Chafee Amendment argument throughout this litigation.[11] Moreover, this Court's Opinion & Order relied in part upon evidence presented exclusively in NFB's motion for summary judgment.[12]

As a full party in this case, NFB could not avoid addressing all the issues interjected by plaintiffs, because they affected the organization's interests. This included assertions from plaintiffs that only can be described as "objectively unreasonable,"[13] including plaintiffs' assertions, roundly rejected by this Court, that Sec. 108 of the Copyright Act somehow restricts the operation of fair use in the context of library reproduction,[14] and that Sec. 121 of the Act does the same with respect to the operation of fair use in connection with the provision of services to the print-disabled.[15] Likewise, NFB was required to address plaintiffs' failure to acknowledge or respond to a decade's worth of case law on "transformative" fair use from this Circuit (and elsewhere) in a timely fashion, although these were precedents that this Court ultimately determined had significant implications for the application of the doctrine to services for the print-disabled. Had Plaintiffs avoided these unnecessary detours, they could have saved the time of both defendants and the Court.

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[11] *Compare* Defs.' Reply in Supp. of Summ. J. at 8-10, *with* NFB's Mem. in Supp. of Mot. to Intervene at 14-16; NFB's Opp'n to Pls.' Mot. for Partial J. on Pleadings at 8-9; NFB's Mem. in Supp. of Summ. J. at 12-14; NFB's Opp'n to Pls.' Summ. J. Mot. at 7-8; NFB's Reply in Supp. of Summ. J. at 2-3, 6-10.

[12] *See* Op. at 3, 18, 21, 23 (relying on Declaration of George Kerscher); Op. at 22 (quoting Declaration of Marc Maurer).

[13] *Lieb v. Topstone Industries, Inc.,* 788 F.2d 151, 156 (3d Cir. 1966), *cited with approval in Fogerty v. Fantasy, Inc.*, 510 U.S. 510, 517, n.19 (1994).

[14] *See* NFB's Opp'n to Pls.' Mot for Partial J. on Pleadings.

[15] *See* NFB's Reply in Supp. of Summ. J. at 2-3.

Plaintiffs mount two attacks on the amount of hours billed by NFB in this case. First, they complain that Peter Jaszi engaged in block billing. Yet "the practice of block billing is not prohibited in this Circuit."[16] As this Court has explained, "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney."[17] Instead, this Court should "look[] at the big picture to see if the total time expended for each portion of this case was reasonable."[18] Nevertheless, if the Court deems Mr. Jaszi's billing too vague, it should reduce the hours that Ms. Jaszi has block billed by some percentage, rather than extract these hours from the fee award entirely.[19]

Second, plaintiffs have focused on what NFB did not do in this case. They have not, however, addressed whether the time NFB expended on motions practice was reasonable. To attack the reasonableness of a fee application, an opponent must provide specific objections and offer some proof as to the unreasonableness of the claim.[20] Here, plaintiffs have raised only the most general of objections and point to no entry or collection of entries for any activity as excessive and provide neither fact nor reason in support.[21]

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[16] *Rodriguez* ex rel. *Kelly v. McLoughlin*, 84 F. Supp. 2d 417, 425 (S.D.N.Y. 1999).
[17] *United States Football League v. Nat'l Football League*, 704 F. Supp. 474, 477 (S.D.N.Y. 1989) (internal quotation marks omitted); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) ("Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended.").
[18] *Burr v. Sobol*, 748 F. Supp. 97, 100 (S.D.N.Y. 1990).
[19] *See, e.g.*, *Ryan v. Allied Interstate, Inc.*, -- F. Supp. 2d --, No. 12-0526, 2012 WL 3217853, at *7 (S.D.N.Y. Aug. 9, 2012) (reducing, rather than eliminating, vague time entries, because "the Court may reduce the fees requested for billing entries that are vague and do not sufficiently demonstrate what counsel did"); *United States Football League*, 704 F. Supp. at 477 (reducing fee award by 10% in light of vague time entries).
[20] *See ACLU of Georgia v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999) (noting that "[t]hose opposing fee applications have obligations, too" and that "objections and proof from fee opponents concerning hours that should be excluded must be specific and reasonably precise") (internal quotation marks omitted).
[21] *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984) (concluding that petitioner waived her right to challenge the number of hours billed by respondent's counsel because she "failed to submit to

On the general issue of entitlement to fees in this case, the NFB incorporates by reference the arguments and legal authority cited by the University Defendants in both their Reply and Memorandum of Law in Support of Defendants' Motion for Costs and Attorneys' Fees. For these reasons and the reasons set forth above, the NFB respectfully requests that the Court grant its Motion for Costs and Attorneys' Fees.

DATED: December 6, 2012

Respectfully Submitted,

/s/ Daniel F. Goldstein

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the District Court any evidence challenging the accuracy and reasonableness of the hours charged, *see Hensley v. Eckerhart*, 461 U.S. 424, 437, and n.12 (1983), or the facts asserted in the affidavits submitted by respondent's counsel").