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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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CAPITOL RECORDS, LLC, et al.,  
  
Plaintiffs,

v.

12 CV 0095 (RJS)

REDIGI INC., et al.,  
  
Defendants.  
-----x

New York, N.Y.  
June 29, 2016  
10:30 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

COWAN, LIEBOWITZ & LATMAN, P.C.  
Attorneys for Plaintiffs  
BY: RICHARD STEPHEN MANDEL  
JONATHAN ZACHARY KING

ADELMAN MATZ P.C.  
Attorneys for Defendant Redigi Inc.  
BY: GARY PHILIP ADELMAN  
SARAH MICHAL MATZ

1 (Case called)

2 THE COURT: Good morning. So I don't have anybody  
3 here representing the individuals; right?

4 MR. ADELMAN: Not that we're aware of, no.

5 THE COURT: In one of your letters to me, Mr. Adelman  
6 or Ms. Matz, you mentioned that the lawyers on the appeal would  
7 be BakerHostetler. Is that what you said?

8 MR. ADELMAN: That is correct. There is a  
9 representative from BakerHostetler here.

10 THE COURT: Who is that?

11 MR. WARSHAVSKY: Oren Warshavsky, your Honor. We have  
12 not yet been engaged. We expect to be, and we've had  
13 discussions. As of late last night, there is still no  
14 retainer. We expect to be very shortly.

15 THE COURT: For the appeal?

16 MR. WARSHAVSKY: For the appeal.

17 THE COURT: But not for this action?

18 MR. WARSHAVSKY: We're also discussing if they'd like  
19 us to appear.

20 THE COURT: That's good to know. Thanks for being  
21 here. If you could just at the end maybe give a card to the  
22 court reporter so she can get the correct spelling.

23 MR. WARSHAVSKY: Yes.

24 THE COURT: I guess we're here principally on the  
25 contemplated motion of the plaintiffs for attorneys' fees.

1           So I received pre-motion letters on that issue, which  
2           is an interesting issue. It seems to me that probably the  
3           plaintiff's case got a little easier with the Supreme Court's  
4           Kirtsaeng decision, but I'm not sure it's a slam dunk.  
5           Obviously, I think we're going to have briefing on this.

6           As with all pre-motion conferences, I like to kick the  
7           tires a bit. That's the reason we have these. They're helpful  
8           for me, and I hope they're not wasteful to the parties.

9           Here it's a little more complicated because defense  
10          counsel is trying to get out of this case. So I guess  
11          everything you do is potentially wasteful if you're not getting  
12          paid. So that's the principal purpose we're here.

13          There's also then a motion to withdraw by counsel for  
14          the defendants and a contemplated motion to register the  
15          judgment in other districts, which I don't think anybody has  
16          responded to.

17          Right, Mr. Adelman? Ms. Matz?

18          MS. MATZ: No, your Honor. We sent a letter last  
19          night. We apologize for the late hour of it. The client asked  
20          us to seek an extension of their time to respond to the  
21          pre-motion conference letter so that they could consult other  
22          counsel.

23          THE COURT: With respect to the registering of the  
24          judgment?

25          MS. MATZ: Yes, your Honor.

1           THE COURT: So I think really we're going to spend  
2 most of our time talking about the attorneys' fees motion. I  
3 guess I'm inclined to grant a little bit of time with respect  
4 to the motion to register, but I want to hear from plaintiffs  
5 as to how they're being prejudiced.

6           You're concerned, Mr. Mandel, that assets are  
7 dissipating as we speak?

8           MR. MANDEL: We have concerns that -- we're not sure  
9 what's going on. I mean, obviously, the defendants were unable  
10 to post a bond which would have been the preferable way to  
11 proceed here.

12           That raises questions. We've had concerns all along  
13 about their financial condition. We now have counsel trying to  
14 withdraw. We don't see why we shouldn't be allowed to register  
15 in other districts.

16           THE COURT: I guess it would require at least some  
17 showing that there is property in other districts. From  
18 preliminary investigation, we know that one of the defendants  
19 owns a home in Massachusetts. They're not located here in  
20 New York.

21           So any assets, I think, are, by definition, not going  
22 to be here. Mr. Rogel is employed as a professor at MIT. He  
23 has a home in Massachusetts. He lives in Massachusetts.  
24 Redigi was based --

25           THE COURT: So you would want to register in

1 Massachusetts?

2 MR. MANDEL: Massachusetts for sure.

3 THE COURT: Where else?

4 MR. MANDEL: To be honest, we're having some problems  
5 determining what the status is with respect to Mr. Ossenmacher.  
6 He appears to reside in California from what we can tell from  
7 investigations. There are other addresses that he's had in  
8 Florida. He uses post-office boxes for addresses. We envision  
9 some challenges, frankly, in being able to enforce it.

10 What is clear is that there doesn't seem to be any  
11 ability to go after any assets that we're aware of here in  
12 New York. To the extent that we're going to be able to enforce  
13 this judgment at all, it's clear we're going to have to go to  
14 other jurisdictions where these defendants are actually located  
15 and where they presumably have whatever assets they do have.

16 So that's the reason for the motion. We really don't  
17 see any reason why we shouldn't be allowed to go and do that.  
18 The judgment is final. If they want to appeal, they can  
19 appeal.

20 They can avoid all this by just posting a bond for  
21 \$3.5 million. That doesn't seem like it's going to happen. We  
22 think we should be able to go ahead and enforce it if we're  
23 able to.

24 THE COURT: I think what I'm inclined to do is  
25 dispense with the pre-motion letter response and allow you to

1 make the motion. I expect the motion would include a  
2 declaration for something to indicate where there is property  
3 and the basis for believing there's property in other places,  
4 and then I'll give defendants some time in which to respond,  
5 but I don't want to drag this out indefinitely. I don't think  
6 there's any reason to prevent you from filing the motion now.

7 MR. MANDEL: Thank you, your Honor.

8 THE COURT: How long do you think it will take you to  
9 file that motion?

10 MR. MANDEL: If we could get it on file by the end of  
11 next week.

12 THE COURT: That's fine.

13 MR. MANDEL: July 8 I think.

14 THE COURT: July 8. And then, Mr. Adelman or  
15 Ms. Matz, do you have a sense as to when the other counsel will  
16 be in this thing?

17 MS. MATZ: Candidly, your Honor, we don't. It sounds  
18 like a lot of this has to do with the individual defendants.

19 THE COURT: Yes.

20 MS. MATZ: We don't represent them, and we don't have  
21 any information as to that that would allow us to respond in  
22 any substance.

23 MR. ADELMAN: As we made clear in our motion,  
24 your Honor, we're not going to speak to it. We have no  
25 information. We were actually told that they were already

1 engaged.

2 THE COURT: Who knows. It's not a fair question for  
3 you.

4 MR. ADELMAN: We would like to ask the Court to at  
5 least allow us to decide our motion prior to --

6 THE COURT: Decide the motion to withdraw you mean?

7 MR. ADELMAN: Decide the motion to withdraw prior to  
8 the Defendants Redigi having to answer on this motion.

9 THE COURT: To respond to the motion?

10 MR. ADELMAN: Yes. We're kind of in a weird limbo.  
11 We've been discharged. Yet, as we know, we know the law, and  
12 we're here following the law. But we continue to be in this  
13 odd legal limbo. We wouldn't know what to do at that point.

14 THE COURT: I think perhaps what I should have done  
15 today is made the individual defendants show up and just make  
16 sure they're aware of your motion, make sure they understand  
17 the consequences of that motion, make sure they understand that  
18 corporations have to be represented by attorneys and that if  
19 they're not, then they're basically in default and inquire as  
20 to whether they're planning to retain new counsel or they're  
21 planning to represent themselves as individuals.

22 I think that's probably what I ought to do. Perhaps I  
23 should have done that today. There are a lot of different  
24 pieces in this case. So maybe I will end up doing that in the  
25 near term.

1 MR. ADELMAN: You can put it in an order, your Honor.  
2 In addition, we're a little different because we had  
3 represented the entity. So the entity needs counsel to appear  
4 here.

5 THE COURT: Yes. The principals would be the ones who  
6 would be in the best position to know if they need to retain  
7 counsel on behalf of the corporation.

8 MR. ADELMAN: That's why I circle back that we request  
9 our motion be granted or at least decided before Defendant  
10 Redigi be required to answer.

11 THE COURT: Yes.

12 MR. ADELMAN: I just wanted to put it on the record.  
13 I hope you don't mind.

14 THE COURT: I would likely grant the motion, but it  
15 would be good to know whether or not there's counsel coming in  
16 and they plan to respond to the attorneys' fees motion,  
17 for example, and the motion to register the judgment or not.  
18 Those would be good things to know.

19 MR. ADELMAN: Yes.

20 THE COURT: So I may drag the defendants right back  
21 here.

22 MR. ADELMAN: I appreciate that, your Honor. Thank  
23 you.

24 THE COURT: So let's now talk about attorneys' fees,  
25 the main event, as we'd like to call it.

1 I've reviewed the pre-motion letters, and I've read  
2 the relevant and recent case law on this.

3 Mr. Mandel, it's your motion. This might have been a  
4 tougher sell before the Supreme Court slapped down the Second  
5 Circuit. But at the same time, this was a pretty novel  
6 situation; right?

7 This is a case that was watched closely in the press  
8 and certainly among folks in the technology press. It was a  
9 one in which a lot of people had strong views on which this  
10 case ought to go. I ruled, and I think I was pretty clear in  
11 my reasoning. It seems to me this is clearly a violation of  
12 the statute, but it seems others disagreed, including some very  
13 smart people.

14 MR. MANDEL: I think Kirtsaeng is very much relevant.  
15 In Kirtsaeng obviously the defendant had lost in the Second  
16 Circuit and got three justices to vote, and the plaintiff got  
17 three justices to vote with them in the Supreme Court.

18 So, clearly, there's a case where you would say that  
19 should be dispositive of the fact that it was a reasonable  
20 position, nonetheless, the Supreme Court felt compelled to send  
21 it back and to say that while objective unreasonableness is  
22 certainly a substantial fact, you have to look at the whole  
23 situation.

24 I think that certainly bears looking at here because  
25 part of what we're really focused on is we think that -- we

1 understand that there were issues that the defendants wanted to  
2 address and thought that they had a right to do. We think that  
3 it was pretty clear that they were wrong about that.

4 Also we think that the opinion on summary judgment  
5 sets that out. There was a course of conduct in particular  
6 after the individual defendants came into the case and were  
7 represented by counsel who is no longer here where they really  
8 followed a course that was designed to prolong the case, we  
9 feel to litigate unnecessarily and unreasonably.

10 They weren't focused on -- if they really had a  
11 legitimate issue about whether or not the for-sale doctrine  
12 applied, that's one thing. But, instead, they spent a lot of  
13 time arguing first with a motion to dismiss, then a  
14 re-argument motion.

15 This was suing the individuals who were the principal  
16 founders of the company and claiming that they didn't know what  
17 they were accused of after they had litigated the case to a  
18 summary judgment conclusion.

19 They then served voluminous discovery asking for all  
20 kinds of things that had no potential relevance to anything,  
21 things like our audit history with respect to musical  
22 compositions, none of which was remotely at issue in this case.

23 They were basing it on totally implausible affirmative  
24 defenses that Redigi, to their credit, didn't even assert  
25 because they would have been frivolous. There was a lot of

1 cost and time lost in that conduct. So that's one principal  
2 aspect of the reason for our motion.

3 I think, when you look at the litigation conduct, it  
4 went well beyond just what we think was a fair defense of  
5 arguably litigable issues and amounted to conduct that was not  
6 appropriate and was reasonably the subject of an attorneys'  
7 fees application.

8 We also believe that there is case law that says a  
9 willful infringement is grounds for attorneys' fees, and we  
10 believe that your Honor's ruling on summary judgment, while it  
11 didn't expressly say it's willful, that you line up the factors  
12 that you found, the factual findings that were made, and  
13 compare it to what the Second Circuit has said with respect to  
14 willfulness, we had argued in limine motions that we actually  
15 were entitled to a ruling that there's already been a willful  
16 infringement.

17 Now, I understand that was never ruled upon and the  
18 case settled. We stand by the arguments we made that we think  
19 as a matter of law there was a willful infringement just based  
20 on the law of the case and the findings and the summary  
21 judgment motion. We think that's also relevant here.

22 The other thing is we are, by agreement, limited in  
23 the amount we can seek. The amount we are seeking is really  
24 less than half the total fees that our client incurred. We  
25 think it is a reasonable exercise here for us to be able to

1 recover the amount that we're seeking.

2 THE COURT: Tell me about what you think the effect of  
3 Kirtseng is with respect to the Second Circuit principle.

4 MR. MANDEL: Well, I think what Kirtseng was saying  
5 is that there was a tendency to say if there's an objectively  
6 reasonable position, it's almost dispositive, that that's in  
7 practice what was coming out of what the Second Circuit and  
8 courts applying it were doing.

9 What the Supreme Court said is that's going too far.  
10 Objective reasonableness is important. It's a substantial  
11 factor, but they actually used language that says it's not  
12 controlling, and it's certainly not dispositive.

13 They had concerns that it had evolved to almost  
14 becoming dispositive because, looking at the actual results,  
15 what you're finding is every case in which the Court finds that  
16 there was a reasonable litigation position, the fees award is  
17 being denied, and the Supreme Court said that doesn't  
18 necessarily follow.

19 THE COURT: So I should give due consideration to all  
20 other circumstances relative to granting fees.

21 MR. MANDEL: Correct.

22 THE COURT: That's a big help.

23 MR. MANDEL: I understand. I think that courts have  
24 always been under the impression, under the Second Circuit  
25 precedence, looked at litigation conduct.

1 THE COURT: What litigation conduct? You're saying  
2 after the individual defendants came in, they made lots of  
3 discovery requests. What about the sort of changing  
4 characterizations of the technology here?

5 Initially, it was sort of copied to a cloud, but  
6 that's okay. Then it was no, no. It's being migrated, sort of  
7 like a train.

8 MR. MANDEL: Right.

9 THE COURT: And in reality, it was copied. It was  
10 really just copying a file and destroying a file that appeared  
11 on the original hard drive.

12 MR. MANDEL: We think that's relevant too because,  
13 quite frankly, they came in. They made their admissions. They  
14 said things in their answer, and they clearly tried to  
15 backtrack and come up with a different story.

16 Obviously, it didn't matter legally in the end, but it  
17 did cost additional time, efforts, in discovery and at the  
18 depositions having to probe into it.

19 THE COURT: Presumably they knew what their technology  
20 was; right?

21 MR. MANDEL: Presumably.

22 THE COURT: Presumably they understood that it wasn't  
23 migrating a file.

24 MR. MANDEL: One would think that they did know that  
25 and that as a result, we retained an expert that we actually

1 put in on summary judgment in response to their motion.

2 We always maintained that the statute spoke for itself  
3 and that this was in the end irrelevant. But, obviously, it  
4 was a distraction. It was litigation conduct that we feel was  
5 inappropriate. This case could have been a lot simpler.

6 The issues that ultimately had to be resolved -- we  
7 came into court from the beginning, and one of the reasons  
8 everybody thought we could do this on a very expedited basis  
9 was there really wasn't much of a dispute about what the  
10 technology was.

11 The question was what's the legal impact of that, and  
12 then perhaps based on the preliminary injunction hearing and  
13 getting a look at your Honor's first read on what the law meant  
14 and how it applied to that, suddenly the story changed, and it  
15 became more complicated than it needed to be. So we think  
16 that's relevant to the attorneys' fees application.

17 Again, the same thing with the individual defendants'  
18 conduct. Mr. Adelman at the first conference I think quite  
19 appropriately and realistically said that no additional  
20 discovery would be required because there wasn't anything more  
21 that anybody needed to know. And yet, nonetheless, we spent  
22 probably two years or more litigating side issues that never  
23 should have been introduced regarding affirmative defenses that  
24 had no merit whatsoever.

25 So, you know, all of that together, we think there is

1 on this record a very legitimate basis for seeking attorneys'  
2 fees.

3 THE COURT: With respect to willfulness, do you think  
4 I'm in a position to rule on that or find that?

5 MR. MANDEL: I think you are. We did brief this on  
6 the in limine motions. And, as I said, I recognize that that  
7 didn't get resolved. If you look at what the Second Circuit  
8 has said willfulness is, reckless disregard of consequences  
9 clearly constitutes that. I don't think there's any doubt on  
10 the summary judgment opinion that the defendants knew or should  
11 have known that the conduct was infringing.

12 THE COURT: I guess the issue, the standard, is  
13 whether the defendant had knowledge that its conduct  
14 represented infringement or perhaps recklessly disregarding the  
15 possibility.

16 MR. MANDEL: I think your Honor's rulings on it shows  
17 there was a reckless disregard for the likelihood of  
18 infringement.

19 THE COURT: Who is carrying the ball for the defense?  
20 Ms. Matz.

21 MS. MATZ: Thank you, your Honor. So I apologize to  
22 the Court. I don't represent the individual defendants. So I  
23 can't speak to some of the arguments that Mr. Mandel has made  
24 with regard to them, but I will address some of the points he  
25 just made.

1 THE COURT: Mr. Mandel, you're seeking attorneys' fees  
2 from all the defendants, not just the corporate defendants?  
3 All the defendants?

4 MR. MANDEL: Yes. One thing I'm not certain -- I  
5 thought Mishcon de Reya did represent the individual  
6 defendants. I thought they put in appearances that included  
7 the individual defendants. I recognize that they also asked to  
8 be discharged. They don't seem to be here today. So I'm not  
9 sure.

10 THE COURT: They don't seem to be here today. I'm  
11 looking through my order to see if there was some ambiguity as  
12 to who needed to be here. I'm not sure why they're not here.  
13 They seem to be acting as though I granted their motion to  
14 withdraw, which I haven't.

15 So I'll issue an order to show cause as to why they  
16 should not be sanctioned for not being here. We're not going  
17 to accomplish as much without them being here. That's not fair  
18 to you.

19 Go ahead, Ms. Matz.

20 MS. MATZ: Just to start, I think the Kirtsaeng  
21 decision is important, and it clarified some of the existing  
22 Second Circuit -- courts that are within the Second Circuit,  
23 some of the rulings that are important to this case.

24 One of the issues that the case clearly addressed was  
25 the promotion of not granting attorneys' fees where a case is

1 going to clarify the boundaries of copyright law, which is  
2 something that other courts in this district have addressed  
3 repeatedly, since one of the goals of the Copyright Act is  
4 broad access to public works, that the courts should not grant  
5 attorneys' fees in cases that are novel or close because it  
6 could potentially have a chilling effect.

7           In a recent Supreme Court case, Kirtsaeng argued that  
8 the attorneys' fees should be awarded in hard and novel cases  
9 because it would essentially encourage clarification in the  
10 law.

11           The Supreme Court actually went to some great length  
12 in explaining why they thought that that might not actually be  
13 the effect of it and that it could actually have a deterrent  
14 effect on parties from asserting objectively reasonable  
15 defenses and vigorously both defending and prosecuting claims  
16 that are going to clarify the copyright law.

17           So within that context, I think that the question  
18 your Honor asked at the beginning was isn't it pretty clear  
19 that this is a novel case. The answer is yes. That was  
20 repeatedly acknowledged by all parties.

21           There weren't any cases out there that dealt with this  
22 specific issue of applying the for-sale doctrine to the type of  
23 technology that we were dealing with.

24           I also think that when you look at the way objective  
25 unreasonableness is defined under the law, that there wasn't a

1 lack of legal support or a factual basis for the defenses that  
2 Redigi asserted. Ultimately the court disagreed and found on  
3 the law that there was liability. But the liability isn't  
4 tantamount to a finding of objectively unreasonableness.

5 Here I think Redigi did act in good faith. The  
6 parties completed discovery, at least Redigi's portion of  
7 liability discovery, in a very short time frame. There were  
8 motions for summary judgment. The parties have always worked  
9 together.

10 At the same time as this was going on, there were  
11 ongoing settlement negotiations. Ultimately, the parties were  
12 able to avoid the expense of a trial by agreeing to the amount  
13 of damages and certain other items.

14 I think all of this shows a course of conduct that  
15 everyone was trying to get to a resolution in this case.

16 THE COURT: What about the sort of shifting  
17 characterizations of the technology which is pretty stark, I  
18 have to say. You may remember at various times we were talking  
19 about "Star Trek" and transporting as opposed to cloning.

20 It was all sort of interesting and all. It turns out  
21 that what this technology really did is pretty clear, pretty  
22 clear from the outset.

23 To suggest that it was migrating or transporting the  
24 way the "Star Trek" folks get from the Enterprise to the planet  
25 is not really what was going on here. Right?

1 MS. MATZ: Well, I actually disagree with that.

2 THE COURT: Okay.

3 MS. MATZ: Obviously, your Honor, as you may recall,  
4 we didn't actually represent Redigi.

5 THE COURT: So I don't think you were there for all of  
6 those arguments.

7 MS. MATZ: I will just say that one of the purposes  
8 obviously of discovery is to get to the issue of how things  
9 work. To the extent that Redigi's previous attorney made  
10 statements in the memo of law -- we argued this at length in  
11 the summary judgment motion -- that the plaintiffs argued were  
12 different and your Honor is saying are somewhat different, I  
13 think that the issue is that the parties were very clear, as  
14 discovery was going on, how the technology worked.

15 The plaintiff asked to look at the code at the  
16 depositions, and it was explained to them. For them to come  
17 back and say, well, we didn't know, and we had to get this  
18 expert that they themselves acknowledged was essentially  
19 irrelevant, I don't think that shows any bad faith.

20 THE COURT: It was the initial hearing; right? That  
21 had to be briefed and litigated. That's sort of what I think  
22 then started us down the road of discovery. I'll give  
23 Mr. Mandel a chance to respond to that when you finish.

24 It sounded to me like this was really going to be an  
25 issue as to what the technology was; that once you folks came

1 in, it became clear as to what the technology was and the legal  
2 theory then changed is not a criticism of you. You folks did a  
3 great job.

4 But I do think it suggests some amount of bad faith  
5 perhaps on the part of the defendants here.

6 MR. ADELMAN: If I may respond to that.

7 THE COURT: She's doing good.

8 MR. ADELMAN: I just want to add this part because  
9 these are the conversations I initially had with the clients  
10 when we were first retained. Without dealing with  
11 attorney-client privilege, it appeared to us, and without  
12 disparaging the prior attorney, that the prior attorney did not  
13 delve into the technology aspect of how the system worked.

14 And after having conversations -- and, in fact, Larry  
15 Rudolph's Rogel's affidavit explains in great detail -- and he  
16 is an MIT scientist -- exactly how the system works.

17 So I don't think that -- if there was not an order to  
18 show cause at that point, the technology --

19 THE COURT: His affidavit in connection with the  
20 preliminary injunction or in connection with summary judgment?

21 MR. ADELMAN: The summary judgment motion.

22 THE COURT: That was a long time later.

23 MR. ADELMAN: If you look at his affidavit, it details  
24 exactly how the system works. It was obviously under seal for  
25 a specific reason, and it's because I asked detailed questions

1 of exactly how it works.

2 My process and so forth is to be skeptical, and he  
3 convinced me that that was the code that he wrote and the  
4 process that he made. I don't think that the previous -- the  
5 previous injunction hearing, the papers were written very  
6 quickly. Obviously, the time to do that was very quickly. I  
7 don't think it was explained to his attorney adequately at the  
8 time. So I do not think there's any bad faith here.

9 THE COURT: I have to go back and take a look. I seem  
10 to recall that some of the representations made to the public  
11 were very consistent with what the lawyer was saying.

12 MR. ADELMAN: I don't recall that. From what I do  
13 recall, I don't think it was inconsistent. I do not.  
14 Nevertheless, I don't think there's bad faith here.

15 I think like you gave us a very short time period to  
16 do discovery. We did all the discovery. We did all the  
17 depositions within that time period.

18 I don't think there was any extraneous work that  
19 needed to be done by the plaintiffs to do this, as Ms. Matz  
20 just said. If you look at the experts' report, it's  
21 basically -- I don't think it would add anything to their  
22 summary judgment motion.

23 The fact that you concluded differently than what we  
24 argued is a different story. But all I'm arguing is I don't  
25 think there was bad faith as we're suggesting here.

1 I don't think that even today -- Redigi's position  
2 today is still that the file migrates. I believe that based on  
3 the patent, if you look at the patent and other things, I think  
4 that bears it out.

5 Again, this is a pre-motion conference. I think that  
6 whoever comes in will explain that in more detail in their  
7 papers. I just wanted to -- since I had the argument with you  
8 at the summary judgment and you mentioned the little  
9 back-and-forth we had about the "Star Trek" factor and all  
10 that.

11 THE COURT: That's right.

12 MR. ADELMAN: I thought that was a very good and  
13 spirited argument.

14 THE COURT: Ms. Matz, what about willfulness? I guess  
15 willful infringement does frequently generate an award of  
16 attorneys' fees. There hasn't been a specific finding of that  
17 so far.

18 Is that something that I should be doing now based on  
19 what was presented in connection with the summary judgment  
20 motion as a basis for determining whether attorneys' fees  
21 should be awarded?

22 MS. MATZ: As your Honor rightly stated, there was  
23 never a finding of willfulness. I don't think that's something  
24 that the Court should be engaging in now.

25 At the end of the day, that was an issue that was

1 going to be decided at trial. The parties were able to resolve  
2 the issue of damages and specifically dispense --

3 THE COURT: Isn't it relevant to this issue of  
4 attorneys' fees?

5 MS. MATZ: I think if there had been a finding of  
6 willfulness in the case, it would be relevant. I don't think  
7 it necessarily would be dispositive.

8 I don't think that, given the fact that the parties  
9 were able to resolve the issue and there has never been a  
10 summary judgment where that was decided, that issue.

11 I know that the plaintiffs raised it on their motion  
12 in limine and whether or not that was a proper issue on a  
13 motion in limine or whether or not that needed to be decided at  
14 summary judgment or at trial, it hasn't been.

15 I'm not sure that it makes sense for there to be an  
16 additional type of briefing on factual determinations that the  
17 parties were ultimately able to dispense with.

18 THE COURT: They were able to dispense with it for  
19 purposes of a settlement. But for purposes of attorneys' fees,  
20 it seems like you folks agreed to disagree.

21 MS. MATZ: I actually think they were able to dispense  
22 with it for the purposes of efficiency and to save everybody  
23 the resources of having to actually try the issue.

24 THE COURT: So what would need to be done to resolve  
25 the issue of willfulness in your view?

1 MS. MATZ: I think that it would have needed to be  
2 determined at trial. That's what the posture of the case was.  
3 That issue was -- it was one of the issues as listed as going  
4 to be decided at trial. Ultimately, there was no trial. I  
5 also think here it would be difficult -- I understand  
6 Mr. Mandel's argument.

7 THE COURT: Right. But to award attorneys' fees, you  
8 think I need to have a trial with a jury to decide facts that  
9 are relevant for purposes of determining attorneys' fees?

10 Do you think Kirtsaeng is contemplating that courts  
11 will have trials by a jury to decide certain facts that would  
12 be relevant to an attorneys' fees calculation?

13 MS. MATZ: No. I think that Kirtsaeng is  
14 contemplating that the Court is going to look at the case and  
15 the findings that were made in the case and is going to weigh  
16 the various factors and putting emphasis on whether or not  
17 there was objectively unreasonable conduct, keeping in mind the  
18 goals of the Copyright Act and the potential deterrent effect  
19 that attorneys' fees awards could have, and that the Court  
20 would make a decision in its discretion.

21 But I don't think that there would be an argument  
22 hinging on a finding of willfulness when there hasn't been a  
23 finding of willfulness in this case.

24 One of the issues that we raised in opposition to the  
25 motion in limine that contemplate a finding of willfulness at

1 this juncture is the application that a jury would use to find  
2 whether there was in the range of damages between 750 and  
3 30,000 or whether there was willfulness, there are a lot of  
4 subjective elements and how they apply to various factors  
5 they're supposed to consider.

6 I think at this juncture, there hasn't been a finding  
7 of willfulness. So I don't think plaintiffs can hinge an  
8 argument that there should be an attorneys' fees award when  
9 there has been no finding of willfulness.

10 THE COURT: Mr. Mandel, let's hear you.

11 MR. MANDEL: If I can just respond very briefly. What  
12 we're saying is there was in effect a finding of willfulness.  
13 It wasn't addressed as being a finding of willfulness expressly  
14 because it wasn't necessary at the summary judgment stage, but  
15 the findings that were made at that summary judgment opinion,  
16 if you look at what those findings were and you apply the law  
17 of wilfulness to them, they amount to willfulness as a matter  
18 of law.

19 So we don't think it's necessary to have a new factual  
20 hearing or any new evidence. It's all been put in front of  
21 your Honor already. I think all we need to look at is your  
22 summary judgment findings and rulings and the applicable law on  
23 willfulness. We think that provides the answer.

24 That's really what we argued in the pretrial  
25 submissions and why we were saying that we didn't think

1 willfulness was an issue for the jury, that it had already been  
2 determined, in effect, by the summary judgment opinion so that  
3 that was why we believed that it really shouldn't even go to  
4 the jury.

5 I recognize that issue your Honor didn't decide, but  
6 there's no reason why you can't decide that issue, which was  
7 briefed once in the context of this motion.

8 THE COURT: Well, you don't think I'm going to need to  
9 consider live testimony? You don't think I'm going to need to  
10 consider additional declarations and things like that?

11 MR. MANDEL: I don't think so. Our position is that  
12 the findings that were made at summary judgment applied against  
13 the applicable law speak for themselves and amount to  
14 willfulness.

15 THE COURT: I don't think I'm going to be able to  
16 resolve this today. I think it's a close call. Candidly, I  
17 think my inclination is to award attorneys' fees.

18 Since defendants are not paying their own attorneys, I  
19 don't think they're going to pay you, Mr. Mandel. In any  
20 event, I'm not ruling. That is my sense. But I think this  
21 would benefit from additional briefing.

22 So when do you want to file your motion?

23 MR. MANDEL: If we could have until July 15.

24 THE COURT: That's fine. Then we run into the same  
25 issue with respect to the defense motion. I do intend to

1 resolve the motion to withdraw before they even file their  
2 motion.

3 I think I'll set a date of 30 days after that. So  
4 that will be August 15 for the defense response and then a  
5 reply in 10 days. That's August 25.

6 MR. MANDEL: Your Honor, can we just ask for two weeks  
7 on reply, because I know I'm on vacation the week after their  
8 response comes in.

9 THE COURT: So the 29th then?

10 MR. MANDEL: Yes. If we could.

11 THE COURT: That's fine. If new counsel comes in,  
12 things could get a little complicated. But I don't want to  
13 reward the defendants for not paying their counsel that  
14 necessitates a change of counsel.

15 Then I guess I'll issue an order to show cause to the  
16 individual defendants and their counsel for not being here  
17 today.

18 Has anybody been in touch with them, counsel for the  
19 individual defendants?

20 MR. ADELMAN: We have spoken to them briefly.

21 THE COURT: About this motion? The motion for  
22 attorneys' fees I mean.

23 MR. ADELMAN: I haven't.

24 MS. MATZ: No. Not in the past couple of weeks, no.  
25 The letter was signed by both. So obviously we spoke with them

1 at the time it was being drafted.

2 Your Honor, if I can just say one other thing.

3 THE COURT: Sure.

4 MS. MATZ: I think there has been a little bit of  
5 confusion created by the fact, without going into too much  
6 detail because I think some of this is confidential, but there  
7 was a representation made that incoming counsel would be  
8 happening very shortly a couple of weeks ago.

9 So to the extent that we are able to resolve those  
10 issues, I think that would be helpful in moving forward.

11 THE COURT: Resolve the issues of counsel?

12 MS. MATZ: Yes.

13 THE COURT: I plan to do that.

14 MR. ADELMAN: I'm not going to speak for Mishcon, but  
15 we have been confused all week. We've been told they were  
16 counsel. Then we were told they were negotiating. Then we  
17 were told that they were paid. Then we were told that they had  
18 a retainer. Then we were told they didn't. It's just been a  
19 mass confusion in the last week. So that's why I'm saying we'd  
20 like this resolved as soon as possible.

21 THE COURT: The docket sheet is kind of a mess because  
22 it lists Mr. Raskin and Mr. DeVincenzo as being with different  
23 firms, but they're both with Mishcon de Reya; right?

24 MS. MATZ: That's our understanding, yes.

25 THE COURT: So I'm not sure where they are and why

1 they're not here, but we'll get to the bottom of that. So I  
2 will resolve this.

3           Remind me where the individual defendants are, the  
4 individual defendants themselves, physically. One is in  
5 Massachusetts? Is that right?

6           MR. ADELMAN: I believe Mr. Rudolph Rogel lives in  
7 Massachusetts. I have no idea where Mr. Ossenmacher presently  
8 resides.

9           THE COURT: You're local?

10          MR. ADELMAN: Yes.

11          THE COURT: I think I'm probably going to issue an  
12 order that schedules a conference just with the defendants and  
13 their counsel basically. Since some of that is likely to  
14 involve privileged materials, I would probably have that  
15 sealed, at least for the time being, and not have plaintiffs'  
16 counsel there.

17          Do you care, Mr. Mandel?

18          MR. MANDEL: No, your Honor. We would like to know  
19 where the defendants are though.

20          THE COURT: You want to know who is in and who's out.  
21 I get that. You don't really feel that you need to be involved  
22 in the nitty-gritty of the decision; right?

23          MR. MANDEL: No.

24          THE COURT: I think that's what we'll do. I'll  
25 probably schedule something for next week on that.

1 Are you around?

2 MS. MATZ: Yes, your Honor. I believe Thursday we  
3 have one other appearance. I think it's in the morning.

4 THE COURT: I'll issue an order on that. I think  
5 that's what we'll do for today. Then obviously, if  
6 BakerHostetler is coming in for everybody, so much the better  
7 because they're here and know what took place today.

8 If not, then I guess the individual defendants are  
9 going to have to respond on their own and represent themselves.  
10 And the corporate defendant, it sounds like, is going to be in  
11 default, which will have implications for all of these motions  
12 and implications, perhaps, for the appeal too.

13 Who is counsel of record on the appeal?

14 MR. ADELMAN: Nobody that we're aware of.

15 MS. MATZ: We've been advised that Baker --

16 MR. ADELMAN: We've been advised that BakerHostetler  
17 is handling the appeal.

18 THE COURT: That sounds like that's not the case.

19 MR. ADELMAN: We have no idea. We know that the due  
20 date for the motion to appeal is close at hand, which is why  
21 potentially we have this hearing or meeting with all the  
22 parties on Tuesday. I think that's the last day to file an  
23 appeal.

24 THE COURT: So there's a meeting on Tuesday?

25 MR. ADELMAN: No. You're issuing an order to bring us

1 all in.

2 THE COURT: When is good for you?

3 MR. ADELMAN: I could do it tomorrow. That would be  
4 fine with me and preferable. Of course your Honor has his own  
5 schedule. I would even come in Friday. We're actually closing  
6 our office today, but I'm around. Ms. Matz will be in  
7 California. I'm around tomorrow or Friday or Tuesday.

8 THE COURT: Do you have a preference between those  
9 three? I'm starting a trial on Tuesday.

10 MR. ADELMAN: My preference would be Thursday or  
11 Friday for sure. That way the issue would get resolved. Then  
12 there would be no -- it would just be resolved, and I can enjoy  
13 my July 4.

14 MS. MATZ: Your Honor, alternatively -- I don't know  
15 if your Honor would be open to this or not. But to the extent  
16 that it would need to happen sooner rather than later, like  
17 Gary said, we're not entirely sure where they physically are at  
18 this moment -- perhaps a telephone conference.

19 THE COURT: That's always an option. My preference is  
20 that people who are around can pop in.

21 MS. MATZ: Of course.

22 THE COURT: I can do Friday morning if that works.

23 MR. ADELMAN: I'm going to say it works. We're  
24 closing the office. So I assume that nothing is scheduled.

25 THE COURT: It may be hard to get people on that date.

1 That's my thinking.

2 MR. ADELMAN: It may. You're right, your Honor. I  
3 know I can be here. Ms. Matz can be on the telephone.

4 MS. MATZ: Absolutely.

5 THE COURT: Tomorrow? It's now noon. It's 11:30.  
6 What do you think? 2:30 tomorrow?

7 MR. ADELMAN: That would work. Yes. Absolutely.

8 THE COURT: Let's plan on that. I'll issue an order.  
9 If people can't make it in person, they can, I guess, dial in,  
10 and we can do it that way. We might as well get this resolved.

11 I think I'm going to grant the motion to withdraw. I  
12 don't think law firms should work for free. At this point, I  
13 don't think the plaintiffs will be prejudiced. If defendants  
14 decide they don't want to have counsel and defaults follow, I  
15 don't think that affects the plaintiffs too much.

16 Whether you collect on a judgment may be harder or  
17 easier, but the lack of counsel is not going to make too much  
18 of a difference.

19 MR. MANDEL: Right. That's fine, your Honor.

20 MS. MATZ: Your Honor, if I may, may I just ask to  
21 appear by telephone tomorrow at 2:30?

22 THE COURT: You may.

23 So that's fine. If you want to appear telephonically,  
24 that's fine too.

25 MS. MATZ: Should we dial in for the Court's

1 convenience?

2 THE COURT: It's probably easier if you set up a call.  
3 I'd rather have people present, but on one day's notice, that's  
4 going to be tricky if the individual defendants are outside of  
5 the state.

6 MR. ADELMAN: I agree, your Honor.

7 THE COURT: I'll set it up as a telephone conference.  
8 I'll issue an order, and I will set the dial-in number.

9 MR. ADELMAN: Very good, your Honor. Thank you so  
10 much. Good seeing you.

11 THE COURT: Is there anything else we should cover  
12 today?

13 MR. MANDEL: No, your Honor. Not from plaintiffs'  
14 perspective.

15 THE COURT: So I'm going to issue a scheduling order  
16 with respect to the two motions: July 15 for the motion on  
17 attorneys' fees, July 8 for the motion to register the  
18 judgment, August 15 for the defendant's response. I haven't  
19 set a response date for the motion to register.

20 Mr. Mandel, that needs to move quickly in your view?

21 MR. MANDEL: We think it should move quickly. We  
22 don't really know what basis there is to oppose it.

23 THE COURT: I'm going to set a date for a response on  
24 July 22, but I'm open to moving that if I hear that that's a  
25 hardship for anybody.

1 MS. MATZ: Thank you, your Honor.

2 MR. ADELMAN: Thank you, your Honor.

3 THE COURT: I don't think I even need a reply. If you  
4 want to reply, you can ask, but I'm not going to schedule a  
5 reply for that.

6 MR. MANDEL: That's fine, your Honor.

7 THE COURT: Thanks a lot. Always interesting.

8 I want to thank the court reporter for her time and  
9 talents. If anybody needs a copy of the transcript, you can  
10 take that up with the court reporter. And then tomorrow at  
11 2:30, I'll hear from some of you.

12 (Adjourned)

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