

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

<b>Capitol Records, Inc., et al.,</b>	)	
<b>Plaintiffs,</b>	)	
<b>vs.</b>	)	<b>Case No. Civ. 04-1569-W</b>
	)	
<b>Debbie Foster and Amanda Foster,</b>	)	
<b>Defendants.</b>	)	

**ORDER**

This matter comes before the Court on the Plaintiffs' Motion for Reconsideration of This Court's February 6, 2007 Order (docket no. 166). The matter has been fully briefed and the Court makes its determination as follows.

A motion for reconsideration is not among the motions recognized by the Federal Rules of Civil Procedure and is of very limited appropriateness. The Plaintiffs assert that their motion for reconsideration may be determined under either Rule 59 or Rule 60 of the Federal Rules, but decline to advise the Court which Rule they seek to invoke. In any case, neither rule is applicable because the February 6 order is not an appealable final judgment. American Soda, LLP v. Filter Wastewater Group, Inc., 428 F.3d 921, 924 (10<sup>th</sup> Cir. 2005) (award of attorneys' fees was not final until the court's entry of judgment reduced the award to a sum certain). The plaintiffs' motion shall, therefore, be treated as one directed to the Court's inherent power to modify orders pending final judgment.

A motion for reconsideration is appropriate in instances where the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties. Such a motion is also appropriate where the Court has made an error not of reasoning, but of apprehension. Finally, a motion for reconsideration would be proper where a controlling or

significant change in the law has occurred since the parties' submission of an issue to the Court. None of those situations is present here.

**1. The Court's February 6 order is entirely consistent with Fogerty v. Fantasy, Inc.**

The plaintiffs challenge the Court's determination that the defendant is entitled to an award of attorneys' fees on the ground that such an award was not dictated by the factors set forth in Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). The plaintiffs do not suggest that the Court failed to consider Fogerty. Rather, they argue that it did not properly apply Fogerty to their case. Setting aside the fact that the plaintiffs' argument falls outside the proper parameters of a motion for reconsideration, the Court notes that the plaintiffs strive to imbue the "Fogerty factors" with a talismanic import the U.S. Supreme Court clearly did not intend. In Fogerty, the Supreme Court affirmed that under the Copyright Act, a prevailing party's entitlement to an award of attorney's fees is a matter left to the trial court's discretion. It acknowledged what have become known as the "Fogerty factors" simply as a guide to trial courts evaluating whether a prevailing party should be awarded fees under the peculiar facts of a given case. The Supreme Court stated, "[t]here is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" Fogerty at 535, quoting Hensley v. Eckerhart, 461 U.S. 424, 436-437 (1983). The Court then set forth, in a footnote, the following:

Some courts following the evenhanded standard have suggested several nonexclusive factors to guide courts' discretion. For example, the Third Circuit has listed several nonexclusive factors that courts should consider in making awards of attorney's fees to any prevailing party. These factors include 'frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.' Lieb v. Topstone Industries, Inc., 788 F.2d 151, 156 (1986).

We agree that such factors *may be used* to guide courts' discretion so long as such factors are faithful to the purposes of the Copyright Act *and are applied to prevailing plaintiff and defendants in an evenhanded manner.*

Fogerty at 535, fn. 19 (emphasis added.).

A fair reading of Fogerty makes abundantly clear the fact that the so called "Fogerty factors" are neither exclusive nor determinative.<sup>1</sup> Nonetheless, in its February 6 order, this Court explicitly considered each of them. While the Court stopped short of finding the plaintiffs' secondary copyright infringement claims frivolous or objectively unreasonable, it did find that such claims were "untested and marginal." While the Court did not find the plaintiffs' motives were necessarily improper, it did find those motives to be questionable in light of the facts of the case. Finally, contrary to the plaintiffs' assertion, the Court did conclude that the Fogerty factor regarding the need for compensating the prevailing party under the particular circumstances of the case was, in fact, met. The Court noted that where, as here, the prevailing party is the defendant who, by definition, receives no award for damages at the successful conclusion of a meritorious defense, considerations of compensation become particularly important. See also Woodhaven Homes & Realty, Inc. v. Hotz, 396 F.3d 822, 824 (7<sup>th</sup> Cir. 2005) (without the prospect of an award of attorneys' fees, a defendant might be forced into a nuisance settlement or deterred altogether from exercising his rights).

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<sup>1</sup>The plaintiffs stress that they "**they are not aware of a single reported decision where a Court has found none of the Fogerty factors but still awarded fees ...**" See Plaintiffs' Reply in Further Support of Their Motion for Reconsideration of this Court's February 6, 2007 Order at p. 3, (emphasis in original). The Court has made no effort to canvass all such cases. Its cursory research has, however, uncovered a number of *unpublished* cases where courts granted record company plaintiffs, including several of the plaintiffs herein, awards of attorneys' fees without so much as a passing mention of Fogerty or its factors. See e.g., Capitol Records, Inc. v. Lyons, 2004 WL 1732324 (N.D. Tex.); Elektra Entertainment Group, Inc. v. Bryant, 2004 WL 783123 (C.D. Cal.); UMG Recodings, Inc. v. Davito, 2005 WL 3776349 (N.D. Ind.).

The plaintiffs appear to suggest that they may disregard the Court's finding addressing the fourth Fogerty factor because the Court failed to invoke their preferred incantation. The Court stated, "this case presents a situation where considerations of compensation under Fogerty weigh in favor of the Court's award of attorneys' fees to Ms. Foster." The plaintiffs insist that to be effective, the Court was required to state its finding in terms of "the need for" compensation. The Court is satisfied that its finding is sufficient to justify its award of attorneys' fees to the defendant.

Although this Court did conscientiously apply the Fogerty factors, it did not limit its considerations thereto. Rather, it heeded the Supreme Court's admonition that such factors are, and must at all times remain, subservient to the purposes of the Copyright Act. With regard to those purposes, the Fogerty Court observed,

[b]ecause copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. Thus, a defendant seeking to advance meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious infringement claims.

Id. at 519.

Having found that the plaintiffs' secondary copyright infringement claims were untested, this Court concluded that the purposes of the Copyright Act would be well served by the encouragement of litigation of those claims. The defendant did litigate the claims and prevailed, albeit through the plaintiffs' voluntary dismissal.

The Court cannot embrace the plaintiffs' contention that its reading of Fogerty renders the decision "superfluous." Fogerty's real importance is entirely independent of the factors set forth as dicta in a footnote. The decision strikes down the "dual standard in which courts generally awarded attorneys' fees to prevailing plaintiffs as a matter of course while denying fees to prevailing

defendants absent a showing that the plaintiff's lawsuit was frivolous or brought in bad faith." In so doing, the Supreme Court recognized the "important role played by copyright defendants." Fogerty at 532, fn. 18. This Court is confident that its February 6 order is true to Fogerty's dictate that prevailing plaintiffs and defendants be treated alike.

**2. The Court did not assume there was no basis for the plaintiffs' secondary copyright infringement claims.**

Contrary to the plaintiffs' contention, this Court did not assume there was no basis for the plaintiffs' secondary copyright infringement claims, nor did it find that the plaintiffs were required to show that the defendant had actual knowledge of the underlying infringement. The Court certainly did not make a finding that contributory and vicarious claims cannot be viable in cases where copyrighted works have been downloaded or shared utilizing file-sharing software and an Internet account. The Court reviewed the limited record developed in this particular case and concluded that it offered scant support for secondary copyright claims. The plaintiffs' complaint, which pursuant to Rule 8 of the Federal Rules of Civil Procedure must "set forth a short and plain statement of the claims showing that the pleader is entitled to relief," stated merely that:

Plaintiffs are informed and believe that Defendants, without the permission or consent of Plaintiffs, have contributorily and/or vicariously infringed Plaintiffs' Copyrighted Recordings, *including, but not limited to the extent that one or more members of their household engaged in copyright infringement.* Defendants' acts constitute infringement of the Plaintiffs copyrights and exclusive rights under copyright law.

First Amended Complaint, ¶ 16, (emphasis added).

The sum of the allegations set forth in the plaintiffs' claim for secondary copyright infringement against the defendant was that members of the defendant's household engaged in copyright infringement. Based on the limited record and the fact that the plaintiffs could not point to a single case finding secondary liability for copyright infringement under similar circumstances,

the Court concluded the plaintiffs' secondary copyright claims appeared to be marginal and were indisputably untested.<sup>2</sup> It therefore concluded that the purposes of the Copyright Act were advanced by the defendant's litigation of such claims.

The plaintiffs assert that had the case continued, they would have proved their secondary liability claims. Specifically, they contend they would have been able to show that the defendant knew or "should have known" that her Internet account was being used by a member of her household to infringe the plaintiffs' copyrights. That may be so. The plaintiffs, however, chose not to pursue the claim. The Court finds disingenuous the plaintiffs' assertion that "had they been given an opportunity, they would have been able to prove vicarious infringement." The plaintiffs were in no way deprived of an opportunity to prove their allegations. They moved, voluntarily, to dismiss their claims after the defendant had already made a substantial investment toward defending against those claims.

**3. The plaintiffs did not offer to dismiss their claims against the defendant until after she had already undertaken the litigation of those claims and incurred substantial expenses therefor.**

The plaintiffs take issue with the Court's observation that the defendant's only alternative to litigating the plaintiffs' secondary copyright infringement claims was to capitulate to a settlement for a violation she insists she did not commit. Nothing in the plaintiffs' recounting of the parties' settlement negotiations, whether prior to the filing of the plaintiffs' suit or afterward, suggests the Court's observation was inaccurate. The plaintiffs contend that beginning on April 21, 2005, they

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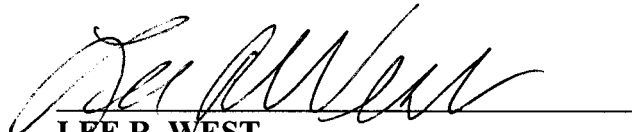
<sup>2</sup> While it appears that the Court's formulation of the elements of contributory and vicarious copyright infringement claims is consistent with the Supreme Court's pronouncements in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), adoption of the plaintiffs' formulation would not alter the Court's determination with regard to the defendant's entitlement to attorneys' fees.

gave the defendant “repeated opportunities to end this litigation without paying anything.” Of course, that is not true. By the time the plaintiffs offered to dismiss their claims against the defendant, she had made a considerable litigation investment, and would have been required to pay those expenses already incurred. Furthermore, the plaintiffs offered merely to dismiss their claims without prejudice, thus leaving the defendant exposed to continued litigation in the matter.

The plaintiffs also persist in conflating the defendant’s daughter’s infringement with liability on the part of the defendant. While the plaintiffs obtained a default judgment against the daughter, there has never been any finding of liability on the part of the defendant. On the contrary, she prevailed against the plaintiffs’ claims.

For the foregoing reasons, the plaintiffs’ motion for reconsideration of this Court’s February 6, 2007 order is DENIED.

ENTERED this 23<sup>rd</sup> day of April 2007.

  
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**LEE R. WEST**  
**UNITED STATES DISTRICT JUDGE**