

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AKILAH HUGHES,
Plaintiff,

-v-

CARL BENJAMIN *a/k/a Sargon of Akkad*, JOHN
DOES 1–10, *inclusive*,
Defendants.

No. 17-cv-6493 (RJS)
OPINION AND ORDER

RICHARD J. SULLIVAN, Circuit Judge:

Defendant Carl Benjamin, also known as “Sargon of Akkad,” brings this motion for attorneys’ fees pursuant to 17 U.S.C. § 505 following the Court’s dismissal of the copyright infringement action brought by Plaintiff Akilah Hughes against Benjamin and ten “John Doe” defendants. For the reasons set forth below, the Court grants Benjamin’s motion and concludes that he is entitled to \$38,911.89 in attorneys’ fees and costs.

I. BACKGROUND AND PROCEDURAL HISTORY

The Court presumes the parties’ familiarity with the underlying facts and procedural history of this case, which are set out more fully in the Court’s February 3, 2020 opinion and order (Doc. No. 39 (the “Opinion”)), and offers only a short summary of each for purposes of this opinion and order.¹

¹ In deciding this motion, the Court has considered Benjamin’s memorandum of law in support of his motion (Doc. No. 42 (“Def. Mem.”)), Hughes’s memorandum of law in opposition (Doc. No. 45 (“Pl. Mem.”)), Benjamin’s reply (Doc. No. 48 (“Reply”)), and the exhibits and declarations filed in connection with those submissions.

On November 18, 2016, Hughes, an internet commentator and filmmaker, posted a nine-minute-and-fifty-second video titled *We Thought She Would Win* to her YouTube channel. (*Id.* at 2; Doc. No. 32, Ex. A.) *We Thought She Would Win* consisted of footage of Hughes at Hillary Clinton’s campaign party at the Jacob Javits Convention Center in Manhattan on November 8, 2016, the night of the 2016 presidential election. (Opinion at 2.) In the video, Hughes related the night’s events and commented on the implications of Secretary Clinton’s defeat by now-President Donald Trump. (*Id.*)

The next day, Hughes discovered that Benjamin, a fellow YouTuber but with a decidedly conservative/libertarian bent, had posted a video titled *SJW Levels of Awareness* to one of his YouTube channels. (*Id.*) Benjamin’s video consisted entirely of six clips from *We Thought She Would Win*, totaling one minute and fifty-eight seconds, spliced together. (*Id.*) Hughes responded by submitting a “takedown notice” to YouTube pursuant to the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512, which led to YouTube disabling public access to Benjamin’s video. (*Id.* at 3.) Benjamin immediately emailed Hughes and requested that she withdraw the takedown notice, asserting that his video fell within the fair use exception to the Copyright Act as parody or satire. (*Id.*; Doc. No. 46-1 at 2.) Three days later, after Hughes refused to withdraw her notice, Benjamin sent YouTube a DMCA counter notification, asserting that *SJW Levels of Awareness* was “entirely transformative and intended for parody.” (Doc. No. 1 (“Compl.”) at 10 (internal quotation marks omitted); Opinion at 3.) Thereafter, YouTube reinstated public access to Benjamin’s video. (Opinion at 3.)

On August 25, 2017, Hughes initiated this action for damages and injunctive relief. (Compl. at 11–12.) Hughes’s complaint alleged that Benjamin infringed on her copyright of *We*

Thought She Would Win through his public posting on YouTube and Twitter of *SJW Levels of Awareness*. (*Id.* at 9–10.)

Throughout the course of this litigation, Hughes prominently referenced Benjamin and the ongoing suit on Twitter. For instance, on December 8, 2016, Hughes tweeted that she had “a [C]hristmas present on the way” for Benjamin, referring to the lawsuit. (Doc. No. 43 at 5.) On October 28, 2018, Hughes tweeted that she was “currently suing [Benjamin’s] white supremacist ass for stealing [her] content.” (*Id.* at 6.) Two months later, Hughes referred to Benjamin in a tweet as a “carnival barker” and expressed a desire to convince the crowdfunding platform GoFundMe to terminate Benjamin’s campaign to fund his legal costs for this action and to “bankrupt” Benjamin with a libel suit. (*Id.* at 2.) And on February 12, 2019, Hughes replied to a tweet predicting that she would lose her copyright lawsuit by declaring that she was “gonna take hundreds of thousands of dollars USD” from Benjamin. (*Id.* at 7.)

On February 3, 2020, the Court concluded that *SJW Levels of Awareness* plainly fell within the fair use exception to the Copyright Act and dismissed Hughes’s complaint. In particular, the Court determined that “a reasonable observer who came across [Benjamin’s video] would quickly grasp its critical purpose” (Opinion at 7), that “Benjamin’s target audience (generally political conservatives and libertarians) is obviously not the same as Hughes’s target audience (generally political liberals)” (*id.* at 9), and that “the fair use defense clearly applies based on the face of Hughes’s complaint and a review of the videos themselves” (*id.*).

Approximately two weeks later, Benjamin moved for attorneys’ fees and costs under 17 U.S.C. § 505 and Federal Rule of Civil Procedure 54(d). (Doc. No. 41.) Hughes opposes his request, arguing that she had a “good faith belief” that Benjamin violated her copyright, that her only motivation for commencing this action was to protect her copyrighted work, that she “litigated

her claims reasonably” by attempting to reach a settlement, that Benjamin has already received adequate compensation through his crowdsourcing campaign to pay his legal fees, and that an award would not deter similar litigation in the future because “widespread public criticism as a result of losing this lawsuit” has already provided a sufficient deterrent.² (Pl. Mem. at 3–5.)

II. JURISDICTION AND APPLICABLE LEGAL STANDARD

The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338(a). Section 505 of the Copyright Act allows district courts to “award a reasonable attorney’s fee to the prevailing party” in a copyright action. 17 U.S.C. § 505. Although courts possess “broad leeway” to award fees under § 505, *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985 (2016), that discretion should be exercised with an eye towards furthering the Copyright Act’s purpose: “enriching the general public through access to creative works,” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

While this is necessarily a holistic inquiry, the Supreme Court has identified several factors – termed the *Fogerty* factors – that help guide the analysis: “frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence.” *Kirtsaeng*, 136 S. Ct. at 1985 (quoting *Fogerty*, 510 U.S. at 534 n.19). Of those factors, the objective unreasonableness of the losing party’s position carries the most “weight.” *Id.* at 1989. But no one factor is necessarily dispositive. *Id.* Indeed, a court may award fees even where the losing party put forward reasonable arguments, so long as an award would further the Copyright Act’s goal of ensuring public access to new creative works. *See id.*

² On June 11, 2020, Benjamin submitted a supplemental letter to the Court, asserting that Hughes has made several additional public statements since the Court issued its Opinion that “further justif[y] the requested award” of attorneys’ fees. (Doc. No. 50 at 1.) Hughes responded by asserting that the Court should “strik[e]” the supplemental letter “from the record” or, alternatively, grant Hughes the opportunity to submit a reply. (Doc. No. 51 at 1.) The Court has not considered or relied on either of these letters in resolving Benjamin’s motion. As a result, Hughes’s motion is denied.

at 1988–89; *see also Fogerty*, 510 U.S. at 534. Consequently, courts should not award fees and costs “as a matter of course; rather, a court must make a more particularized, case-by-case assessment.” *Kirtsaeng*, 136 S. Ct. at 1985 (internal quotation marks omitted).

Should a court determine that an award of fees is warranted, that does not end its inquiry. It must then assess the prevailing party’s requested fees to ensure that they are reasonable. *See Crescent Publ’g Grp., Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 150 (2d Cir. 2001).

III. DISCUSSION

A. The *Fogerty* Factors Favor a Fee Award

1. Objective Unreasonableness

Objective unreasonableness, which should be given “substantial weight” when determining whether to award fees, *Kirtsaeng*, 136 S. Ct. at 1989, “is generally used to describe claims that have no legal or factual support,” *Viva Video, Inc. v. Cabrera*, 9 F. App’x 77, 80 (2d Cir. 2001); *see also Muller v. Twentieth Century Fox Film Corp.*, No. 08-cv-2550 (DC), 2011 WL 3678712, at *1 (S.D.N.Y. Aug. 22, 2011) (Chin, *J.*) (“A copyright infringement claim is objectively unreasonable when the claim is clearly without merit or otherwise patently devoid of legal or factual basis.” (internal quotation marks omitted)). Notably, however, a position is not unreasonable merely because it is weak. *See Leibovitz v. Paramount Pictures Corp.*, No. 94-cv-9144 (LAP), 2000 WL 1010830, at *3 (S.D.N.Y. July 21, 2000). In addition, though the finding that a plaintiff advanced an objectively unreasonable claim can be sufficient grounds on which to award fees to the prevailing defendant, the Supreme Court has made clear that such a finding does not automatically trigger an award. As a result, “in any given case a court may award fees even though the losing party offered reasonable arguments (or, conversely, deny fees even though the losing party made unreasonable ones).” *Kirtsaeng*, 136 S. Ct. at 1988; *see also Matthew Bender*

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