

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS**

ANDREW P. MALLON)	
)	
Plaintiff,)	ECF CASE
)	
v.)	
)	Case No. 4:14-cv-40027-TSH
JOHN MARSHALL, and)	
DENNIS J. GOEBEL)	
)	
Defendants.)	

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’
MOTIONS FOR ATTORNEY’S FEES**

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PRELIMINARY STATEMENT

To Dr. Mallon, this case has always been about Defendants improperly taking his creative works. Undeniably, the parties have numerous other disputes, and for every wrong there is not a legal remedy. However, in this case, Dr. Mallon sought the one legal remedy he believed he was entitled—a declaratory judgment of joint authorship.

While the Court has ruled in favor of Defendants on Summary Judgment, attorney's fees are not appropriate in this case. Dr. Mallon brought this case in a good faith attempt to adjudicate his legal rights and only as a last resort. His claims while not successful were not frivolous or unreasonable. And he made every effort to keep the scope and cost associated with the case limited.

This is also not the type of case, in a legal or equitable sense, that warrants attorneys fees. The purpose of the attorney's fees provision is to prevent serial infringers that would go unpunished but for the availability of attorney's fees and to prevent litigants from repeatedly enforcing weak copyright infringement claims through intimidation and the fear of legal fees. This is a traditional dispute that the American Rule was created for and the American Rule should prevail here. Dr. Mallon has no savings, is collecting unemployment, while the Defendants are collecting millions of dollars in grants based in part on Dr. Mallon's work on the PLoS Biology Paper.

BACKGROUND

I. Plaintiff Has Worked to Reduce Litigation Costs

A. Plaintiff Filed Defendants' Motion to Extend to Prevent Defendants from Defaulting.

In order to help Defendants avoid default and unnecessary legal fees, Plaintiff's counsel alerted Defendants of the Court's denial of their request for an extension and filed their extension as a joint request. On April 2, 2014, Dr. Marshall filed a request for an extension to answer the Complaint Pro Se. (D.I. 7.) The Court denied his request the same day for failure to meet and confer. (D.I. 9.) Knowing that Defendants were not receiving notices on ECF and that they would default before learning of the denial, Plaintiff's counsel contacted Brown's general counsel office to let them know of this development and help the Defendants' file an extension. On April 3 and 4, Plaintiff counsel filed Defendant's motion for an extension of time as a joint motion. (D.I. 10, 12.) Plaintiff's counsel filed these extensions on behalf of Defendants in order to avoid unnecessary expense and wasting court resources. (O'Reilly Dec., ¶ 1, Exhibit A.)

B. Plaintiff Limited Discovery to Reduce Costs

Throughout discovery, Plaintiff worked to limit discovery and avoid unnecessary disputes.

Plaintiff limited depositions to the two defendants. Despite believing that the other listed authors on the paper would have important and valuable testimony regarding the drafting of the PLOS Biology Paper, Plaintiff did not notice these witnesses in attempt to keep the litigation as lean as possible. (*Id.*, ¶ 2.)

In terms of scheduling of depositions, Plaintiff accommodated Defendants' request in attempt to save money. For example, Defendants' counsel requested, and Plaintiff agreed to take Dr. Mallon's deposition in New York City so that Defendants' counsel could concurrently meet

with another client. Defendants' counsel also requested a specific date for the Goebel deposition to accommodate his travel schedule, to which Plaintiff agreed. (*Id.*, ¶ 3.)

In fact, after Dr. Mallon's deposition, Defendants' counsel asked if Plaintiff would agree not to depose Dr. Goebel as most of testimony was "duplicative" of Dr. Marshall. In a further effort to reduce the scope of the litigation, Plaintiff agreed not to depose Dr. Goebel if Defendants would agree not to call him at trial. Defendants refused, so the deposition went forward. (*Id.*, ¶ 4.)

As far as document production is concerned, Plaintiff made every attempt to limit costs and make production as easy as possible. Plaintiff agreed the parties should produce documents in the cheapest and easiest forms available to the parties. (*Id.*, ¶ 5.) And despite, reservations about the scope of Defendants' production, especially their refusal to produce lab notebooks from Dr. Cao Cong, Plaintiff did not push the issue in order to avoid unnecessary cost and wasting court resources. (*Id.*, ¶ 5.)

C. Dr. Mallon's Arguments Related to His Employment as Faculty was Sincere.

Defendants argument that counsel's acquiescence during oral argument that Dr. Mallon was not a faculty member for purposes of the summary judgment brief is evidence of bad faith litigation is misplaced. (Memorandum, D.I. 63, pg. 13, point 3.) On the contrary, counsel made a decision to drop this argument after reading all of the briefing and hearing Defendants' counsel argument and recognizing it was the weaker of Plaintiff's arguments. Counsel dropped this argument to promote judicial efficiency. (O'Reilly Dec., ¶ 6.) Courts should incentivize parties to limit their arguments and not maintain them for the sole reason that to drop them is seen as an admission that they were made in bad faith.

D. Dr. Mallon's Discovery on Defendants' Intent to Remove Him As An Author was Related to Facts of this Case and Defendants Agreed.

Dr. Mallon's counsel sought discovery on the parties' relationship and the reason for their dispute. Counsel believed that this discovery was important to understanding the relationship between the parties and for explaining to a jury why Defendants refuted Dr. Mallon's claim of authorship. (O'Reilly Dec., ¶ 7.) Needless to say, Defendants objected to many of Plaintiff's requests and agreed to produce those document they deemed relevant and answer those requests they deemed relevant. Further, the fact that Plaintiff did not use certain evidence in his Opposition to Defendants' Motion for Summary Judgment is irrelevant. Evidence used in a summary judgment is and should be used different than the evidence introduced at trial.

II. Defendants Have Escalated Litigation Costs

A. Defendants unnecessarily hired two sets of lawyers.

Defendants first step at unnecessarily increasing costs and legal expenses was hiring two sets of lawyers, one based in Worcester, MA (Gould & Ettenberg, P.C.) and the other based in Chicago, IL (Tottis Law). Hiring two law firms for this case was excessive, and hiring a lead counsel based half way across the country needlessly increased Defendants' costs in this case.

B. Defendants' motion practice was excessive.

Defendants filed multiple lengthy motions in this case. Defendants filed a motion to dismiss, a motion for reconsideration, a motion for summary judgment that spanned almost 700 pages, and a motion for fees that ran about 400 pages. The number of motions and their length show that Defendants litigated with utter disregard for the costs. They cannot now accuse Plaintiff of increasing their costs when the record clearly shows that it was Defendants, and not Plaintiff, that caused their costs to soar.

III. Dr. Mallon's Motivation for Filing This Case Was to Prove That He Was Joint Author of the PLOS Biology Paper

Dr. Mallon filed this case to prove that he was a joint author on the PLOS Biology in an attempt to rehabilitate his reputation. Drs. Marshall and Goebel had repeatedly sought to spread false rumors about his work on the PLOS Biology Paper and generally hurt his reputation. Dr. Marshall told Brown administrative staff that Dr. Mallon falsified data in his lab, a charge he admitted in deposition was not true. (Mallon Dec., ¶ 9.) He told Dr. Mallon's collaborator that he was under investigation by the FBI, a false charge that ended that collaboration. (*Id.*, ¶ 8.) The Defendants also told investigators from the National Institute of Health that Dr. Mallon had committed fraud, resulting in the loss of a grant. (*Id.*, ¶¶ 3-5.) And earlier the Defendants admittedly and improperly accused Dr. Mallon of committing fraud with respect grant connected to the PLoS Biology Paper. (*Id.*, ¶ 10.)

It was only after years of trying unsuccessfully to rehabilitate his reputation that Dr. Mallon filed this lawsuit to prove his contribution and authorship.

IV. Defendants' Accusation That Dr. Mallon Needlessly Prolonged This Case With Demands of Retraction Are False

Defendants incorrectly argue that Plaintiff's demand for a retraction prolonged this litigation. Defendant never offered to settle this case with the agreement of joint authorship. In fact, in early settlement discussions, Defendants' counsel was steadfast in arguing that their settlement position was that the parties could "agree to disagree." (O'Reilly Dec., ¶ 8; Mallon Dec., ¶ 13.)

In fact, when Defendants' counsel accused Plaintiff of unnecessary delaying this case with the demand for retraction at the Summary Judgment Hearing, Plaintiff's counsel was taken aback and asked if Defendants' counsel was in fact offering to settle this case with the agreement

that Dr. Mallon was a joint author with no associated retraction. (O'Reilly Dec., ¶ 9; Mallon Dec., ¶ 14.)

After discussing the issue with Dr. Mallon, Plaintiff's counsel agreed that this offer made sense and offered to settle the case on Wednesday February 24, 2016. Defendants' counsel agreed to respond by early next week. (O'Reilly Dec., ¶ 10.)

Instead of a response, on Monday, Dr. Mallon received a restraining order stating that Dr. Mallon was not to enter Brown University campus because of the ongoing litigation. Dr. Mallon was scheduled to present at Brown the next week.¹ Fully understanding that Defendants were not interested in settling, and that they instead wished to escalate their dispute further, Dr. Mallon rescinded his offer of settlement. Defendants never responded substantively to Plaintiff's offer or made an offer themselves. (O'Reilly Dec., ¶ 11; Mallon Dec., ¶¶ 15-18.)

V. The Issues the Court Ruled on Were Difficult, But Dr. Mallon Did Not Misrepresent or Hide the Facts that Formed the Basis of the Court's Order.

Dr. Mallon pled in his original Complaint the facts that formed the basis of the Court's Order. Dr. Mallon alleged that he had a falling out with Dr. Marshall in 2011. (Complaint, D.I. 1, ¶ 24.) He alleged that after he stopped working on the paper, Dr. Marshall and the other authors published it. (*Id.*, ¶ 27.) And Dr. Mallon alleged that he was removed as an author on the paper because Dr. Marshall knew that he would insist that they not publish it without significant revisions. (*Id.*, ¶ 46.)

Further, although the Court granted Defendants' summary judgment by finding that his intent at the time of publication of the PLOS Biology Paper meant that he was not joint author, the Court did not address the majority of Defendants' summary judgment arguments. The Court

¹ After receiving the Notice Not to Trespass, Dr. Mallon contacted Brown administrative personnel, who apologized for the Notice and assured him he could make his presentation at Brown. (Mallon Dec., ¶ 17.)

did not rule on whether the PLoS Biology paper was a derivative work, whether it was a work for hire, whether and when Dr. Mallon did the work, whether Dr. Mallon was a faculty member, and interpretation of the Brown Patent Policy. (D.I. 57, pg. 11.) Surely these were not easy questions.

And even the basis for the Court's opinion was a departure from Defendants' argument. The Defendants' relied on a technical argument that there were two papers composing an initial and derivative work, split with the submission of one to the Journal Neuron. (Memorandum, D.I. 49, pg. 16-19.) The Court, on the other hand, took a holistic approach, finding that the split in intentions at a later date meant that Dr. Mallon was no longer an author. (Opinion, D.I. 57, pg. 10.)

LEGAL ARGUMENT

I. **Section 505 Is Directed to Copyright Infringement Actions—Not Copyright Authorship Disputes.**

Attorney's fees are not appropriate in this case because this case is a declaratory action for joint authorship, not a copyright infringement action.

“The Copyright Act ... creates an exception to th[e] general rule [that parties bear their own litigation costs] by providing that a district court, ‘in its discretion,’ may ‘award a reasonable attorney's fee to the prevailing party’ in a **copyright infringement action**. 17 U.S.C. § 505.” *Airframe Sys. v. L-3 Communs. Corp.*, 658 F.3d 100, 108 (1st Cir. 2011) (emphasis added). While such references are dicta for the holding that section 505 is limited to copyright infringement actions, they emphasize the common sense reading, and proper statutory interpretation, that Section 505 is limited to copyright infringement actions.

The title of Section 505 is “Remedies for **infringement**: Costs and attorney’s fees.” 17 U.S.C. § 505 (emphasis added). It is in a series of Sections, all directed specifically to copyright infringement. *See* 17 U.S.C. §§ 501-504. The title of Section 505 shows that the drafters of Section 505 had copyright infringement in mind when drafting the section and intended to limit to copyright infringement actions.

On a first and incomplete reading, it may appear that Section 505 allows attorneys fees beyond copyright infringement actions. This is because the text of the statute reads “[i]n any civil action under this title’ and because many courts have held that copyright authorship claims are brought under the copyright act.

A simple explanation as to why “under this title” was used in a Section 505, and yet was titled “Remedies for Infringement,” is that drafters of the Act were not contemplating subject matter jurisdiction but rather the express causes of actions contained in the Copyright Act when they drafted Section 505. The Copyright Act has no cause of action for joint authorship, thus it makes sense that the drafters of the Act used “under this title” in a section titled and dedicated to infringement remedies if “under this title” refers to causes of actions.

Even assuming the drafters had considered the meaning of “under this title” in a subject matter context, in 1976, the meaning of “under this title” was not clear. As the First Circuit has noted “A more controversial basis for ‘arising under’ jurisdiction under section 1331 exists were a well-pleaded complaint necessarily requires resolution of a substantial question of federal law. The Supreme Court has periodically affirmed this basis for jurisdiction in the abstract ... occasionally cast doubt upon it, rarely applied it in practice, and left the very scope of the concept unclear. Perhaps the best one can say is that this basis endures in principle but should be applied with caution and various qualifications.” *Almond v. Capital Props.*, 212 F.3d 20, 23-24

(1st Cir. 2000). More to the point, it appears it wasn't until six years after the adoption of the Act that any court addressed whether a declaratory action for joint authorship was brought under the Act. *See, Lieberman v. Estate of Paddy Chayefsky*, 535 F. Supp. 90 (S.D.N.Y. 1982) (appearing to address the issue of whether the court had subject matter to hear a declaratory judgment action for joint authorship under the 1976 Copyright Act for the first time).

In addition to the ambiguous meaning of “under this title” in 1976, the Supreme Court has made clear that when the statute itself is ambiguous, even “literal application of words as they are normally used” do not preclude reading and interpreting the statute as a whole. *Desylvia v. Ballentine*, 351 U.S. 570, 573 (1956) (holding that the Court must interpret the Copyright Act of 1909 “as a whole, putting each word in its proper context.”). Here, it is clear that Section 505 of the 1976 Act is directed to and intended for copyright infringement actions. Reading “under this title” within context with the title of the section “Remedies for infringement: Costs and attorney’s fees,” and the four infringement sections proceeding it, leads the conclusion, that Section 505 is directed to and limited to infringement actions.

The purpose of Section 505 also supports the plain reading that Section 505 is limited to copyright infringement actions. The Supreme Court has noted that one of the purposes of Section 505 is to “deter repeated instances of copyright infringement or overaggressive assertions of copyright claims.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1989 (2016). Claims of joint authorship are more akin to traditional tort and contract claims than they are to copyright infringement claims. There is little danger of plaintiffs filing serial joint authorship claims in attempt to extort royalty payments, nor is their danger of potential

defendants repeatedly violating joint authorship rights because of the knowledge that suing them is too difficult. Joint authorship cases are not the type of harm Section 505 is trying to remedy.²

II. The Relevant Factors Weigh Against the Award of Legal Fees

The courts consider a number of non-exclusive factors when determining if legal fees are appropriate in a copyright action. These include factors such as frivolousness, motivation, objective unreasonableness, and the need for deterrence and compensation. *Kirtsaeng*, 136 S. Ct. at 1989. Although some courts treat objective unreasonableness as an extension of the frivolousness analysis, and other use it to address litigation conduct, it is clear that party's reasonableness during litigation is often central to the court's legal fees analysis. *See, e.g., Spooner v. EEN, Inc.*, 644 F.3d 62, 65 (1st Cir. 2011).

A. Dr. Mallon's Arguments Were Not Frivolous or Objectively Unreasonable.

Defendants do not argue that Dr. Mallon's arguments in this case were frivolous, nor can they. Defendants prevailed on Summary Judgment only after three rounds of briefing: Motion to Dismiss, Motion for Reconsideration, and Motion for Summary Judgment. And despite Defendants' argument that Dr. Mallon's arguments were objectively unreasonable, Defendants filed a twenty page brief in support of their motion for summary judgment, a twenty-one page statement of undisputed facts, with 101 allegedly undisputed facts, and 34 exhibits totaling 642 pages. (D.I. 48-1- 48-6, 49, and 50.) Defendants clearly thought they had to make every possible argument for them to have a chance to prevail.

² Plaintiff has not found any cases addressing the impact the title of Section 505 directed to copyright infringement has on the application of the section outside of the copyright infringement context. While, other courts have considered and allowed for the awarding of fees in joint authorship cases, Plaintiff has not found any that address the impact of the title on the availability of fees in those cases. *See, e.g., Michael Skidmore v. Led Zeppelin et al.*, 15-cv-03462-RGK, D.I. 312, Order Denying Fees, (C.D. Cal., August 8, 2016) (O'Reilly Dec., Exhibit D.)

Further undermining Defendants' claim that Dr. Mallon's claims were objectively unreasonable is Defendants' previous position that they did not intend to file a motion for summary judgment. At the parties' first status conference on 5/14/2015, Defendants' counsel represented to the court and Plaintiff that they did not intend to file for summary judgment in this case and planned to move to trial. (O'Reilly Dec., ¶ 12.) It seems unreasonable to argue that Dr. Mallon's arguments were objectively unreasonable when Defendants initially did not even believe summary judgment was warranted in this case.

Defendants also incorrectly argue that Dr. Mallon's lack of candor caused this case to drag on and increase their costs. (D.I. 63, pg. 16.) The basic facts relied upon the Court in granting Summary Judgment, namely that Dr. Mallon and Defendants did not intend to work together at the time of publishing the PLoS Biology Paper and that Dr. Mallon would not have agreed to its publication were pled by Dr. Mallon in his complaint. (*See supra*, pg. 6.) And Dr. Mallon's request for retraction was included in his amended complaint, which was filed as an exhibit to his Opposition to Defendant's Motion to Dismiss. (D.I. 27-2.)

While Dr. Mallon respects the Court's ruling, the record shows that it was not an easy decision. The Court's decision appears to depend on a legal conclusion that although Dr. Mallon contributed to the article with all parties intending to merge that contribution into a joint work, when they subsequently made changes after the parties intentions diverged it created a new work in which Dr. Mallon was not a contributor. (Opinion, D.I. 57, pg. 10.) Defendants have never articulated their argument in quite this manner, instead relying on an overly technical argument that submitting a version of the article to Neuron made the PLoS Biology Paper a derivative work to which Dr. Mallon did not contribute. (Defendant's Memorandum in Support of Their Motion for Summary Judgment, D.I. 49, pg. 16-19.) An argument that the Court did not address.

Therefore to argue that the Court's opinion to grant summary judgment show that Dr. Mallon's arguments are objectively unreasonable is unpersuasive.

Moreover, to the extent Dr. Mallon's position was objectively unreasonable, Defendants' could have saved everyone a lot of time and money if they filed a simple brief arguing this point. Instead, Defendants filed almost 700 pages in support of their motion summary judgment and included numerous separate arguments because they recognized the difficulty and unpredictability in winning on this issue.

B. Dr. Mallon's Motivation in Bringing This Case Was Proper.

Dr. Mallon brought this case to prove he was a joint author of the PLoS Biology Paper.

The courts have held that if "plaintiff's motivation was [] a good faith intent to protect a valid interest" an award of legal fees is less likely. *Yankee Candle Co. v. Bridgewater Candle Co., LLC*, 140 F. Supp. 2d 111, 116 (D. Mass. 2001). Dr. Mallon's motivation in bringing this case was to secure a declaratory judgment that he was a joint author.

The fact that Dr. Mallon used non-confidential information to support his claims that academic misconduct occurred does not mean that he did not bring this case to prove he is a joint author.

The case that Defendants cite in support of their contention that Dr. Mallon's motivation was improper, *Johnson*, explains why Dr. Mallon's motivation is not the type frowned upon by the Courts. In that case, the Plaintiff brought the case to financially cripple the defendant and increased litigation costs unnecessarily to do so. *Johnson v. Storix, Inc.*, 2016 U.S. Dist. LEXIS 110278, at *10 (S.D. Cal. August 17, 2016). Here, just the opposite happened. Dr. Mallon worked to keep fees in this case as low as possible for both parties. He had one objective, that objective was to prove his contributions in a court of law.

In fact, when Defendants suggested that they would settle this case with only an agreement that he was a joint author, Dr. Mallon jumped at the chance only to have Dr. Marshall attempt to ban him from Brown University and prevent him from participating in an academic conference. It was Defendants that rebuffed that proposal.

C. Dr. Mallon Attempted to Reduce Defendants' Litigation Cost by Working Cooperatively Throughout Litigation.

Dr. Mallon worked throughout this litigation to keep litigation costs down and this factor weighs heavily in favor of no legal fees. At every stage of this litigation, Dr. Mallon's counsel attempted to work with opposing counsel to reduce costs. From filing extensions for Defendants so that they would avoid default, to limiting discovery, to avoiding discovery disputes, to accommodating deposition requests, Dr. Mallon's counsel never attempted to increase the burden on Defendants and always attempted to reduce their legal fees.

Dr. Mallon's conduct is the exact opposite of the type courts admonish when awarding legal fees. *See, Spooner*, 644 F.3d at 65 (noting that "What followed was the litigation equivalent of hand-to-hand combat. ... It suffices to say that the parties engaged in frenetic motions practice, conducted extensive discovery, and squabbled over a plethora of issues (large and small).")

Dr. Mallon's sincere attempts to limit litigation costs weighs strongly in favor of no legal fees.

D. Deterrence and Compensation Do Not Warrant Fees In This Case.

Deterrence and compensation mitigate against an award of attorney's fees in this case.

Defendants argue that the Court should award fees to prevent Dr. Mallon from bringing additional lawsuits. (D.I. 63, pg. 17-18.) Dr. Mallon has never previously brought a lawsuit,

does not have the funds to bring another lawsuit, and is not motivated to do so. (Mallon Dec., ¶¶ 19-24.) Unlike cases of serial copyright infringement or assertion, deterrence is not necessary in this case.

Compensation also mitigates against attorney's fees. As explained, Dr. Mallon did not run up Defendants' legal costs, rather it was Defendants' decision to employ multiple lawyers in different cities and pursue a kitchen sink legal strategy that resulted in multiple and excessive filings that increased their legal fees. Moreover, this is not a case of a large industry player inflicting legal costs on a smaller player. *See, Yankee*, 140 F. Supp. 2d at 119. On the contrary, Dr. Mallon is now on unemployment (Mallon Dec. ¶ 23), while the Defendants are enjoying grants worth millions of dollars, in part as the result of Dr. Mallon's research and writing efforts (Memorandum, D.I. 63, pg. 6).

Dated: November 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brian D. O'Reilly, hereby certify that on November 13, 2016 a true copy of the attached document was filed through the ECF system and will be sent electronically to all counsel of record, as identified on the Notice of Electronic Filing.

/s/ Brian D. O'Reilly

Brian D. O'Reilly