

FILED
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Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, a
California non-profit corporation,

Plaintiff.

v.

H. KEITH HENSON, an individual,
Defendant.

NO. C 96-20271 RMW
ORDER ON REQUEST FOR ATTORNEY'S FEES
[Re Docket Nos. 561, 568, 572]

1. Procedural History

The issue pending before the court is the amount of attorney's fees to award to plaintiff Religious Technology Center ("RTC") for various phases of this case. The matter is before the court on remand from the Ninth Circuit to address the attorney's fees issue. Specifically, in its memorandum decision dated June 23, 2000 the Ninth Circuit affirmed this court's judgment finding defendant Keith Henson ("Henson") in civil contempt for violation of a court order but remanded the issue of the amount of attorney's fees to which RTC is entitled because the court "failed to make specific findings regarding the rate and number of hours it determined to be reasonably spent on the motion for contempt, as well as the larger scope of proceedings." *Religious Technology Center v. Henson*, 229 F.3d 1158, 2000 WL 825515 (9th Cir. 2000). The court of appeals remanded to the district so that it may make such findings following *Frank Music* and to adjust its figure if needed in considering, among other things, "the degree of success obtained; frivolousness; motivation; objective unreasonableness (both in the factual and legal arguments in the case); and the need in particular circumstances to advance consideration of compensation and deterrence." *Id.* (citations omitted).

After the remand, RTC also moved for supplemental attorney's fees incurred in opposing Henson's unsuccessful petition for certiorari of the copyright infringement judgment and for those fees incurred and to be incurred for further proceedings following remand.

II. Issues Pending

Based upon the above procedural history, the court has three questions before it: (1) the amount of attorney's fees to which RTC is entitled for its successful prosecution of the infringement action; (2) the amount of attorney's fees to which RTC is entitled for Henson's contempt; and (3) the amount of attorney's fees, if any, to which RTC is entitled for opposing the petition for certiorari and for briefing following the Ninth Circuit's remand of the attorney's fee issue.

III. Findings and Conclusions

A. Attorney's Fees for Copyright Infringement Action

1. Rate and Hours

The court has previously determined that an award of attorney's fees is appropriate and this decision has been upheld. *Religious Technology Center* 2000 WL 825515 at *2. Therefore, the question is what amount the court in its discretion finds appropriate. "In setting a reasonable attorney's fee, the district court should make specific findings of the rate and hours it has determined to be reasonable." **Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.**, 886 F. 2d 1545, 1557 (9th Cir. 1989). "District courts should consider, among other things, 'the degree of success obtained; frivolousness; motivation; objective unreasonableness (both in the factual and legal arguments in the case); and the need in particular circumstances to advance considerations of compensation and deterrence.'" *Historical Research v. Cabral*. 80 F.3d 377, 378 n. 1 (9th Cir. 1996), quoting *Jackson v. Axton*. 25 F.3d 884, 890 (9th Cir. 1994).

[1. The "larger scope of proceedings" refers to the underlying copyright infringement proceedings and trial in which Henson was found to have wilfully infringed RTC's copyright. The judgment entered in RTC's favor in the copyright infringement proceeding was affirmed on appeal. **Religious Technology Center v. Henson**, 182 F.3d 927, 1999 WL 362837 (9th Cir. 1999). In addition, RTC had appealed the court's post-trial order setting the amount of attorney's fees to which RTC was entitled which was consolidated with the appeal of the contempt judgment.]

The court will first look at the hours spent by RTC's counsel and the hourly rates charged. RTC maintains that its hours expended, multiplied by its hourly rates,

produces a reasonable fee of \$865,916.18. The court disagrees. A review of RTC's billings show that the services of approximately nineteen lawyers billing at rates between \$110 per hour and \$475 per hour were utilized. The lead trial attorney billed at \$460 per hour. Although the work done was high quality, the court does not accept the assertion that so many experienced copyright and trial specialists were necessary to litigate this relatively straight-forward, albeit emotional, case. Henson represented himself most of the time and brought in one lawyer shortly before trial to provide representation at trial. Unfortunately, both Henson and his lawyer appeared to be more intent on pursuing their cause of exposing and ridiculing Scientology than they were in resolving the case. On the other hand, RTC's approach throughout the case was as aggressive as the court ever sees in litigation and its trial tactics in part appeared designed to make Henson look like a crackpot rather than to establish RTC's claims' RTC also unduly compounded the case by including a misappropriation of trade secret claim in its original filing. Although RTC eventually dismissed this very problematic claim and has not claimed fees for services rendered in connection with it, the claim's inclusion appeared to exacerbate the hostility between the parties. Thus, RTC is itself somewhat to blame for the overall expense of the proceedings.

Although the court does not question the experience, billing rates or expertise of the counsel RTC used, the court concludes Sased upon the issues involved and the fact that Henson represented himself throughout most of the litigation and had a single counsel for trial that RTC unnecessarily staffed the case and with counsel that were higher priced than necessary. Thus, the number of hours expended and the overall rates charged were excessive. The court finds that an average billing rate of \$225 per hour was reasonable for the case. That is a rate consistent, in the court's experience, with that charged by counsel with the experience and ability to handle the case. RTC cannot be expected to be reimbursed for the services of highly experienced and expensive specialists from across the United States when such experience and expertise was not required.[3]

[2. The court on its own excluded some evidence RTC wished to offer and to which Henson and his counsel offered no objection.]

The determination of the reasonable hours required for the case is more difficult to fix. Common sense suggests that nineteen lawyers - no matter how separate their tasks and assignments - were many more than necessary for the efficient handling of the case. Henson certainly contributed to the hours spent by his attempts to turn the case into a crusade to embarrass and ridicule Scientology. On the other hand, RTC was extremely aggressive throughout the litigation and did far more than necessary to prosecute the case. Thus, RTC's counsel's hours were unnecessarily inflated because of the number of attorneys involved, the unnecessary issues which RTC chose to litigate, and the tactics RTC employed in litigating those issues. The basic copyright question in the case was whether the essentially verbatim posting of a copyright protected document amounted to a

wilful infringement, when the poster knew exactly what he was doing and for what purpose. Litigating that question should not have been particularly demanding from a legal or factual standpoint. The court finds that 1750 hours is a reasonable estimate of the hours necessarily expended. Therefore, without adjustment for other factors, the court sets reasonable attorney's fees of \$393,750. However, further adjustments are appropriate.

2. Factors Justifying Adjustment

The award of attorney's fees is discretionary. See *Frank Music*, 886 F.2d at 1556. Therefore, the court can determine that a successful party should not recover all of the fees it actually incurred, or even all of the fees that were reasonably incurred. Here, there are several factors that justify a reduction in the amount of fees awarded. First, Henson had to spend considerable time and energy responding to RTC's problematic trade secret misappropriation claim which was ultimately dismissed. Although he did not use counsel with respect to that claim, he should receive some consideration for the time and energy he spent on it. A credit by way of a reduction in RTC's fees is appropriate consideration even though RTC has not included its own trade secret fees in its fee request. Second, RTC's apparent motivation in pursuing the lawsuit went beyond merely seeking compensation for Henson's infringement and to ensure that Henson did not post RTG's materials again. Instead, RTC's zealous pursuit appeared motivated to punish Henson and to send a message to all critics of Scientology that posting of its confidential documents will result in substantial expense and severe consequences.

[3. In this regard, the court notes that the court of appeals awarded RTC only \$10,000 in attorney's fees for the appeal despite its request for \$135,000. Order dated September 14, 1999. The court of appeals made no findings concerning the billing rate or the number of hours that were reasonably spent on the appeal but justified the lower award by observing that RTC hired numerous copyright specialists, who spent a considerable amount of time litigating this relatively simple case, and who were more than familiar with the law on appeal. ... By contrast, for most of the appellate proceedings, Henson acted prose. Under the circumstances RTC's attorney's fees request is excessive.*Id.* (citations omitted).]

The court does not believe that Henson should bear all the financial costs of that message. And third, the amount of the jury award against Henson was substantial considering the fact that his infringement was limited to the verbatim publication of just one protected work. The jury's damage award was undoubtedly influenced by its consideration of deterrence. See Jury Instruction II. Therefore, RTC received an award designed to deter and in an amount in excess of its actual damages. The verdict alone adequately suffices as a deterrent; it would be inequitable and unjust to require Henson to bear the cost of hundreds of

thousands of dollars in attorneys fees, merely as an additional deterrent. For the above reasons, the court awards RTC only \$75,000 as and for attorney's fees in connection with the copyright infringement case.

B. Attorney's Fees for Contempt Proceedings

1. Rates and Hours

RTC seeks \$96,778.50 as its reasonable fees for the contempt proceedings. The court's findings on the fees incurred with respect to the contempt proceedings are similar to those made with respect to the copyright infringement proceedings, although the number of attorneys used was not as extensive. The quality of the briefing was good but the time spent on the contempt proceeding was excessive.[4] Additionally, most of the travel expenses could have been avoided because the relatively simple contempt motion and trial could have been competently handled by the local counsel retained by RTC. The court believes that a reasonable hourly rate was \$225 per hour and that the total hours reasonably expended was 175. Therefore, without adjustment, a reasonable fee for the contempt proceedings is \$39,375.

2. Factors Justifying Adjustment

Several factors pertaining to Henson's conduct giving rise to the contempt militate against a full award of fees. First, Henson took immediate corrective action to the extent he could once he realized that he had violated the court order by publishing a transcript of a hearing which included a portion that had been sealed. Henson also immediately filed with the court a declaration explaining what he had done and he, in no way, tried to hide his violation. Henson is an individual of modest means who would be rendered indigent if required to pay anything close to what RTC seeks. Finally, the court finds that RTC's zealous and aggressive pursuit of the contempt charge may well have contributed to the need for a full hearing as opposed to an early resolution of the issue. Therefore, the court awards RTC the sum of \$7,500 toward its attorneys' fees and expenses. The court recognizes that this is only a portion of RTC's fees which would be awarded if fees were determined strictly by multiplying rate times hours. However, the court has the discretion to decide whether all, a portion, or no fees should be awarded upon a finding of civil contempt. See **Donovan v. Burlington Northern, Inc.**, 781 F.2d 680,682 (9th Cir. 1986); *Peirvv. ODonnell*. 759 F.2d 702, 705 (9th Cir. 1985).

C. Supplemental Attorney's Fees

1. Henson's Unsuccessful Petition for Certiorari

After the Ninth Circuit affirmed the judgment of wilful copyright infringement against Henson, he filed a petition for certiorari with representation by a prestigious law firm. The petition raised significant First Amendment and fair use issues. RTC filed an opposition and certiorari was denied. RTC now seeks fees

in the amount of \$24,150 for its successful opposition. Attorney's fees for successfully opposing a petition for certiorari are taxable in the district court. *See Perkins v. Standard Oil Company of California*, 399 U.S. 222,223 (1970).

The court finds that RTC is entitled to its fees incurred in opposing the petition for certiorari. RTC's opposition was handled by an appropriately experienced attorney who had to respond to a well-written petition. The seventy (70) hours spent seem reasonable and the \$345 hourly rate is appropriate for this type of specialized work. Therefore, the court awards \$24,150 to RTC as its reasonable attorney's fees for the opposition to Henson's unsuccessful petition for certiorari.

[4. Some briefing was done with respect to the grounds for and procedure to be followed when criminal contempt is sought. The court does not find that any portion of the fees for that work, although informative, is appropriately awarded in this civil proceeding.]

2. Other Supplemental Fees

RTC also asks for supplemental fees incurred by it in complying with the court's order of June 27,2000 following remand and requests that it be permitted ten (10) business days following its receipt of the court's fee award order on remand to submit affidavits quantifying this additional amount. The June 27 order, however, sought a short brief on the issues presented on remand, declarations regarding billing and proposed findings and conclusions relating to attorney's fees. The court has reviewed the materials filed by RTC since the June 27 order and believes it can fairly estimate reasonable fees from what has already been submitted and RTC's request to submit further documents regarding its fees incurred is denied. The court finds that RTC reasonably incurred an additional ten (10) hours of attorney time fairly billed at \$225 per hour. Therefore, RTC is entitled to supplemental fees of \$2,250.

IV. Order

RTC is awarded \$108,900 in attorney's fees from Keith Henson as follows:

1. Attorney's fees for copyright infringement proceedings:
\$75,000.00
2. Attorney's fees for contempt proceedings:
7,500.00
3. Attorney's fees for opposing petition for certiorari:
24,150.00

4. Supplemental attorney's fees following June 27 order:
2,250.00

DATED: 9/12/01

[signed]

RONALD M. WHYTE
United States District Judge

Copy of order mailed on [handwritten date] 9/18/01 to:

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