

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

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CAPITOL RECORDS, INC., a Delaware )  
corporation; UMG RECORDINGS, INC., a )  
Delaware corporation; MAVERICK )  
RECORDING COMPANY, a California joint )  
venture; BMG MUSIC, a New York general ) Case No. CIV-04-1569-W  
partnership; ARISTA RECORDS LLC, a )  
Delaware limited liability company; SONY )  
BMG MUSIC ENTERTAINMENT, a Delaware )  
general partnership; and WARNER BROS. )  
RECORDS INC., a Delaware corporation, )  
)  
Plaintiffs, )  
)  
v. )  
)  
DEBBIE FOSTER and )  
AMANDA FOSTER, )  
)  
Defendants. )

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**PLAINTIFFS' MOTION FOR RECONSIDERATION OF THIS COURT'S  
FEBRUARY 6, 2007 ORDER AND BRIEF IN SUPPORT THEREOF**

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Plaintiffs Capitol Records, Inc., UMG Recordings, Inc., Maverick Recording Company, BMG Music, Arista Records LLC, Sony BMG Music Entertainment, and Warner Bros. Records Inc., through their undersigned counsel, respectfully move this Court for reconsideration of this Court's February 6, 2007 Order ("Order") awarding fees to defendant. For the reasons more fully set forth below, plaintiffs respectfully submit that the Court's Order was based on several errors of law and fact and that the Order should be overturned.

### **SUMMARY OF ARGUMENT**

In its Order, this Court awarded fees to defendant based on the Court's analysis of the factors set forth in Fogerty v. Fantasy, Inc., 510 U.S. 517, 533-34 (1994) and on several assumptions of law and fact. Plaintiffs respectfully submit that each of the premises on which the Court's Order is based is erroneous.

First, although the Court correctly identified the Fogerty factors, the Court, in fact, did not find any of the Fogerty factors to apply here. The Court expressly refused to find that plaintiffs' secondary infringement claims were either frivolous or objectively unreasonable, and the Court was unable to find that plaintiffs had any improper motive, concluding only that there is "a question" or "an appearance" that plaintiffs asserted secondary infringement claims to force a settlement. Plaintiffs respectfully submit that such a finding is not a finding of an improper motivation under Fogerty. As such, none of the Fogerty factors were established here, and an award of fees is inappropriate.

Second, the Court's assumptions that there was no factual basis for plaintiffs' secondary infringement claims and that the sole basis for these claims was that defendant was merely the owner of an Internet account are not supported by the record. Plaintiffs' case against defendant never got past its incipient stages, and co-defendant Amanda Foster defaulted before plaintiffs

had obtained any discovery from her. As such, plaintiffs never had any opportunity to develop a record or to introduce any evidence, and plaintiffs respectfully submit that the Court's reliance in its Order on the purported factual record is, thus, inappropriate. Indeed, other courts have refused to award attorneys' fees precisely where, as here, the factual record was insufficient to allow the court to assess the merits of the respective parties' claims and defenses.

Had plaintiffs had the opportunity to develop a record and introduce evidence here, they believe that they would have been able to prove each and every element of their secondary infringement claims. Contrary to the Court's assumptions, plaintiffs' case did not rest on defendant's mere ownership of an Internet account that her daughter and co-defendant, Amanda Foster, used to infringe plaintiffs' copyrighted sound recordings. Plaintiffs obtained a judgment in this case adjudicating Amanda Foster not only as an infringer, but also as a willful infringer. Amanda Foster committed these substantial acts of infringement using the very same family computer that defendant used during the relevant time period. Given that it has been established that the Kazaa file-sharing program was on the Foster family's computer, the evidence would have established that the Kazaa icon was clearly visible on the computer when defendant was using it and that there were likely a substantial number of pop-up advertisements, the types of which have been associated with the Kazaa program.

In addition, it is undisputed that defendant had an account with Cox Communications. Defendant's subscriber agreement with Cox made clear that defendant, as the account holder, was responsible for what is done on her account. In particular, the agreement prohibited defendant from using the account to infringe copyrights of others and expressly required defendant to act to prevent others from misusing her account by doing so.

Finally, plaintiffs believe that discovery would have revealed substantial other evidence of defendant's knowledge and material assistance in the underlying infringements, but plaintiffs never had the chance to develop or present any of this additional evidence. All of this evidence clearly would have been sufficient to establish a contributory infringement claim.

Likewise, had they been given the opportunity, plaintiffs would have established that defendant, as a parent, had the full right and ability to control her daughter's use of the computer at issue and that defendant had a direct financial interest in her daughter's infringing activities. Plaintiffs submit that these facts, which again go well beyond the mere ownership of an Internet account, would have been sufficient to establish a claim for vicarious infringement. Accordingly, plaintiffs respectfully submit that the Court's conclusions as to the factual and legal predicates for plaintiffs' secondary infringement claims were incorrect and premature.

Third, although the Court assumed that plaintiffs were required to show that defendant had actual knowledge of the underlying infringements and that defendant substantially participated in such infringements, in fact, a plaintiff need only show that the defendant knew or should have known, or was willfully blind to, the underlying infringements and that she induced, caused, or materially contributed to those underlying infringements. Thus, to the extent that the Court's Order was based upon a misunderstanding of the applicable law, the Order should be overturned.

Finally, contrary to the Court's conclusion that defendant had no choice but to capitulate to plaintiffs' settlement demands or litigate, the undisputed facts show that plaintiffs had been trying to dismiss this case, with no cost to defendant, since at least April 22, 2005. Defendant rejected every such opportunity and, instead, chose to expand and continue the litigation at every turn, long after the litigation should have been dismissed. As such, contrary to the assumption

on which the Court based its ruling, defendant had numerous opportunities to end this litigation early, and the decision not to do so was hers alone.

The policies behind the attorneys' fees provisions of the Copyright Act do not support an award of fees here. Indeed, a fee award here would run directly contrary to those policies. In this case, plaintiffs obtained a default judgment against defendant's daughter and co-defendant, Amanda Foster, who was thereby adjudicated to be a willful infringer. Amanda Foster has not yet paid a single penny of this judgment. Now, defendant, who had steadfastly refused to disclose relevant information regarding her daughter's involvement in the infringements at issue, asks this Court to award her fees that may be ten times the amount of the judgment that plaintiffs obtained against Amanda Foster in this case. To award fees in such circumstances would turn the policies of the Copyright Act on their head. If anyone should be paying fees to anyone, Amanda Foster, an adjudicated willful infringer in this case, should be paying fees to plaintiffs. Moreover, were this Court's fee decision to stand, plaintiffs would end up losing twice – first, because they are the victims of massive copyright infringement and, second, because they would be required to pay attorneys' fees that far exceed the amount of the judgment that they obtained in this case. Surely, the fees provisions of the Copyright Act did not envision such a result.

For all of these reasons, plaintiffs respectfully submit that the Court's award of attorneys' fees to defendant was erroneous and should be overturned.

### **ARGUMENT**

#### **I. This Court's Failure To Find Any Of The Fogerty Factors Militates Against An Award Of Fees**

In its Order, at 4-5, the Court focused on three of the Fogerty factors to determine whether an award of attorneys' fees was appropriate. In particular, the Court focused on the

factors of frivolousness, objective unreasonableness, and improper motivation, as those factors applied to plaintiffs' secondary infringement claims. See id.

As to the first two of these factors, the Court expressly refused to find that plaintiffs' contributory and vicarious infringement claims were either frivolous or objectively unreasonable. See id. at 5. As to improper motive, the Court found that "there is a question" regarding plaintiffs' motives and "an appearance" that plaintiffs initiated their secondary infringement claims to force a settlement after they ceased to believe that defendant was a primary infringer. See id. Notably, however, the Court did not find any actual improper motivation under Fogerty, nor could it, because there was no evidence presented to support such a finding.

In short, the Court did not find the existence of any of the Fogerty factors on which it relied. Nor is there any basis to conclude that considerations of compensation and deterrence support an award of fees here. The simple fact is that plaintiffs obtained a judgment against defendant's daughter in this case. As such, awarding fees to defendant here would not deter the filing of any improper claims (the Court not having found any improper claims). Instead, it would deter copyright owners like plaintiffs from protecting their valuable copyright interests, and this chilling effect would run directly contrary to the very purposes of 17 U.S.C. § 505 that this Court itself noted. See Order, at 2-3.

For all of these reasons, plaintiffs respectfully submit that the Court's award of fees was erroneous and should be overturned.

**II. The Court's Assumption That There Was No Factual Basis For Plaintiffs' Secondary Infringement Claims Is Not Supported By The Record And Is Inconsistent With Prior Findings By The Court**

Throughout its Order, the Court assumes that plaintiffs had no factual basis for their contributory or vicarious infringement claims and/or that the sole basis for these claims was that defendant was merely the owner of an Internet account. Based on these findings, the Court

stated, “While the Court is not prepared to pronounce the plaintiffs’ secondary copyright infringement claims to be frivolous or objectively unreasonable, they would certainly appear to be untested and marginal.” Order, at 5. Plaintiffs respectfully submit that the Court’s decision was wrong on both the facts and the law.

First, it is important to keep in mind the procedural context of this case. Plaintiffs filed a Complaint and an Amended Complaint, and defendant responded to those. Plaintiffs also served minimal written discovery on defendant, and defendant served responses, although these responses were inadequate and incomplete. Plaintiffs did not obtain any discovery from Amanda Foster, who defaulted before plaintiffs could do so, nor did they serve any third-party discovery. Finally, not one witness was examined under oath either in or outside of Court. In short, this case was at its incipient stages before plaintiffs, in good faith, decided to dismiss it, after obtaining a default judgment against co-defendant Amanda Foster. As such, there was never any reason or opportunity for plaintiffs to develop a record or present their evidence in this case, and plaintiffs respectfully submit that any “finding” as to the evidentiary basis for their claims is premature. Indeed, applicable law shows that an award of attorneys’ fees on so barren a factual record is particularly inappropriate.

Davidson v. Allis-Chalmers Corp., 567 F. Supp. 1532 (W.D. Mo. 1983) is substantially on point. In Davidson, a plaintiff dismissed with prejudice an employment discrimination action against one of a number of defendants just before trial. The defendant then sought attorneys’ fees under the fee-shifting statute at issue there. Based on the absence of a factual record that would have allowed it to assess whether the plaintiff’s claim was well-founded or not, the court refused to award fees, stating, “[T]he inadequately developed record prevents the Court from concluding that [plaintiff’s] claim against [defendant] was meritless.” Id. at 1545.

The factual record in this case was far less developed than the record in Davidson, where the parties had come upon the eve of trial. Here, the parties did not proceed any further than the pleadings stage and very minimal written discovery. For the same reasons as were set forth in Davidson, because this Court has no factual record on which to determine the relative merits or demerits of plaintiffs' case or defendant's defenses, an award of fees is particularly inappropriate.

Second, the Court's assumption that there was no factual basis for plaintiffs' contributory and vicarious infringement claims and/or that the sole basis for these claims was that defendant was merely the owner of an Internet account is not supported by any admissible evidence in this case and is incorrect. As noted above, there has never been any opportunity or reason for plaintiffs to develop a record or present their evidence. As such, and perhaps unsurprisingly, defendant has submitted no evidence of her own to prove that plaintiffs lacked the evidence necessary to support their claims. The parties never reached a point where defendant would have known what plaintiffs' evidence was. Nor did defendant introduce any evidence to show that plaintiffs had improper motives. Again, there simply is no such evidence. At best, defendant relies solely on the untested allegations of her counsel, which, plaintiffs respectfully submit, is not sufficient to support this Court's findings as to plaintiffs' motives or the factual basis for plaintiffs' allegations. Indeed, plaintiffs fully believe that they would have been able to satisfy each of the elements of contributory and vicarious infringement, had this case moved forward.

In order to prove a claim of contributory infringement, a plaintiff must show that defendant, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. See Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971); accord Metro-Goldwyn-Mayer Studios

Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005); Bridgeport Music, Inc. v. Rhyme Syndicate Music, 376 F.3d 615, 621 (6<sup>th</sup> Cir. 2004); Casella v. Morris, 820 F.2d 362, 365 (11<sup>th</sup> Cir. 1987). For purposes of this test, the standard of knowledge is an objective one, namely, whether the alleged contributory infringer had knowledge or a reason to know of the infringing activity. See Gershwin Publishing Corp., 443 F.2d at 1162; accord Bridgeport Music, 376 F.3d at 621; Casella, 820 F.2d at 365. Moreover, it is well-settled that “[w]illful blindness is knowledge, in copyright law . . . , as it is in the law generally.” In re Aimster Copyright Litigation, 334 F.3d 643, 650 (7<sup>th</sup> Cir. 2003), cert. denied, 540 U.S. 1107 (2004) (citations omitted) (finding that willful blindness satisfies the knowledge requirement of a contributory infringement claim). As such, constructive knowledge is sufficient.

To prove a claim of vicarious infringement, a plaintiff must show that defendant had the right and ability to supervise the infringing activity and also had a direct financial interest in such activities. See Gershwin Publishing Corp., 443 F.2d at 1162; accord Grokster, 545 U.S. at 930; Bridgeport Music, 376 F.3d at 621; Casella, 820 F.2d at 365.

Here, plaintiffs had sufficient facts to plead claims for secondary infringement, and the Court necessarily agreed as much when it allowed plaintiffs to amend their Complaint over the objection of defendant, see Order, dated July 6, 2005, and when it found that the allegations of the Amended Complaint were not frivolous or objectively unreasonable. See Order, at 5. Moreover, plaintiffs believe that, had they had the chance to conduct discovery, develop a record, and introduce evidence, the evidence would have shown that defendant had knowledge or reason to know of, or was willfully blind to, the infringing activity of her daughter. Plaintiffs further believe that, with this knowledge of or willful blindness to the infringing activity of her daughter, defendant materially contributed to the underlying infringements by, among other

things, providing the computer and the Internet access necessary to conduct the infringing activities, and by failing to take any steps to prevent the substantial infringements that were occurring under her nose.

Contrary to the Court's assumptions, plaintiffs' case did not rest on the mere ownership of an Internet account that Amanda Foster used to infringe plaintiffs' copyrighted sound recordings. Plaintiffs obtained a judgment in this case adjudicating Amanda Foster not only as an infringer, but also as a willful infringer. Amanda Foster committed these substantial acts of infringement using the very same family computer that defendant used during the relevant time period. See Defendant's Response to Interrogatory No. 4 (verifying the Amanda Foster used the computer at issue, which was the computer at issue in connection with the default judgment against her) (attached as Exhibit A). Given that it has been established that the Kazaa file-sharing program was on the Foster family's computer, the evidence would have established that the Kazaa icon was clearly visible on the computer when defendant was using it and that there were likely a substantial number of pop-up advertisements, the types of which have been associated with the Kazaa program.

In addition, it is undisputed that defendant had an account with Cox Communications. Defendant's subscriber agreement with Cox made clear that defendant, as the account holder, was responsible for what is done on her account. In particular, the agreement prohibited defendant from using the account to infringe copyrights of users and expressly required defendant to act to prevent others from misusing her account by doing so. See Cox Acceptable Use Policy (current version), at ¶¶ 1, 3 & 7 (attached as Exhibit B).

Finally, plaintiffs believe that discovery would have revealed substantial other evidence of defendant's knowledge and material assistance in the underlying infringements. For example,

the computer may well have been in a common area such that defendant heard music coming from the computer when admitted infringer Amanda Foster was using it. In addition, the evidence may have established, as it has in other similar cases, that there were viruses on the computer due to Kazaa and that defendant may have had work done on the computer that would have revealed the existence of the file-sharing program. Because of their good faith decision to dismiss this case at an early stage, plaintiffs never had the chance to develop any of this additional evidence. Plaintiffs respectfully submit, however, that the above-cited evidence that they had already developed was more than sufficient to support a claim of contributory infringement.

Similarly, plaintiffs believe that, had they been given the opportunity, they would have been able to prove vicarious infringement. Specifically, plaintiffs would have proved that, as a parent, defendant had the full right and ability to control her daughter's use of the computer at issue. Most parents impose restrictions on computer usage by their children (e.g., rules about pornography sites and chat rooms), and plaintiffs believe that defendant would have done so as well. Plaintiffs further would have proven that defendant had a direct financial interest in her daughter's infringing activities, which, of course, involve substantial sums of money in terms of the value of the recordings at issue and the potential liabilities resulting from such activities.

In light of the foregoing, plaintiffs respectfully submit that there is no basis for the Court's assumptions that plaintiffs had no facts to support their secondary infringement theories or that plaintiffs' legal theory was that the mere ownership of an Internet account is sufficient to establish claims of secondary infringement. See Order, at 4. Accordingly, the Court's finding that plaintiffs' theory of secondary infringement was "untested and marginal," see id. at 5, was based upon a misunderstanding of plaintiffs' actual theory, and plaintiffs respectfully ask the

Court to correct this error. Plaintiffs believe that such a correction is particularly important, because defense counsel in other cases like this across the country are already citing the Court's statement, albeit out of context, in an effort to suggest that this Court has found that contributory and vicarious infringement claims in cases like this one are not viable. Such citations are misleading and inappropriate, and this Court is in the best position to stop them.

For all of the foregoing reasons, plaintiffs respectfully request that the Court reconsider and overturn its Order.

**III. The Court's Order Is Based On Erroneous Assumptions As To The Law Regarding Claims For Contributory Infringement**

In its Order, at 5, the Court suggested that, to sustain a finding of contributory infringement, plaintiffs were required to show that defendant had substantially participated in the underlying infringements and that defendant had actual knowledge of those infringements. See Order, at 4. These assumptions as to the applicable law, on which the Court appears to have relied heavily in making an award of fees, are incorrect.

As noted above, to prove a claim of contributory infringement, a plaintiff must show only that defendant, with knowledge of the underlying infringing activity, induced, caused, or materially contributed to the infringing conduct of another. There is no requirement that a plaintiff plead or prove that the defendant substantially participated in the underlying infringement, as the Court assumed. See Order, at 4-5. Nor is there a requirement that a plaintiff plead and prove that the defendant had actual knowledge of the underlying infringement, as the Court also assumed. See id. Rather, as noted above, a plaintiff need only show that the defendant knew or should have known of, or was willfully blind to, the underlying infringements, rendering constructive knowledge of the infringements sufficient.

For all of these reasons, to the extent that this Court based its Order on erroneous assumptions as to prevailing copyright law, the Order should be overturned.

**IV. The Court's Finding That Defendant Had No Choice But To Capitulate To Plaintiffs' Settlement Demands Or To Litigate Is Contrary To The Record**

Finally, the Court appears to have based its Order on its finding that defendant had no choice but to capitulate to plaintiffs' settlement demands or to litigate. See Order, at 8. This finding is contrary to the undisputed record in this case.

It is undisputed that plaintiffs had been attempting to dismiss their claims against defendant for almost a year before succeeding in doing so. Specifically, the record shows the following:

- In October 2004, prior to filing the instant lawsuit against defendant, plaintiffs contacted defendant by telephone to discuss the matter. When defendant suggested that her husband or daughter "may" have committed the infringements at issue, plaintiffs asked defendant to check with her family members and to call back. Defendant never returned that phone call or the two additional messages that plaintiffs' representative left for her.
- Not having heard back from defendant, plaintiffs filed the current lawsuit. Plaintiffs did not name Amanda Foster at this time, because they did not feel that defendant's statement as to her daughter's potential involvement was sufficiently concrete to allow plaintiffs to proceed against the daughter.
- Approximately one month later, defendant contacted plaintiffs and again stated that she "believed" that her daughter or her husband were responsible for the infringement. Although plaintiffs again did not feel that this information was definitive enough to support an amendment to the Complaint, based on defendant's representations, plaintiffs offered to settle with the entire Foster family. Defendant indicated that she would consider plaintiffs' offer and call back, but she never did so, nor did she respond to two follow up telephone calls, choosing, instead, to file an Answer.
- In February 2005, defendant's attorney entered her appearance. Plaintiffs' counsel attempted to contact defendant's attorney at this time and left numerous voicemail and e-mail messages in order to discuss possible resolution of the case. Again, defendant did not respond to any of these communications. Instead, defendant chose to file an Amended Answer and Counterclaims, one of which was dismissed on plaintiffs' motion.

- On April 21, 2005, an attorney representing defendant's daughter contacted plaintiffs and offered to have defendant's daughter sign an affidavit admitting liability. This was the first definitive statement that plaintiffs had received indicating that defendant's daughter was actually the primary infringer (as opposed to statements that she "may" have been the primary infringer). The very next day, plaintiffs' counsel attempted to reach defendant's attorney to discuss dismissing the case. Again, defendant's attorney did not respond to the messages that plaintiffs left for her.
- On May 16, 2005, plaintiffs again contacted defendant's attorney to discuss possible resolution of the case. Defendant's attorney was unwilling to speak about settlement or dismissal at that point.
- Approximately one week later, the parties finally discussed settlement again, and plaintiffs offered to dismiss all litigation against defendant without prejudice. Defendant rejected this offer, demanding, instead, that plaintiffs pay an exorbitant amount of attorneys' fees. Plaintiffs rejected that offer but left open their offer to dismiss their claims against defendant without prejudice.
- By this time, plaintiffs were left in a difficult position. Plaintiffs were certain that members of the Foster family, including defendant, bore responsibility for the substantial infringements at issue. The Foster family, however, refused to take responsibility for any of their actions and refused to come forward with relevant information, providing evasive and insufficient written discovery responses and refusing most of plaintiffs' efforts to engage in a meaningful dialogue. Instead, the family demanded that plaintiffs walk away from their clearly meritorious infringement claims and, indeed, pay the Foster family a substantial sum to do so. Although plaintiffs, who were the victims of substantial copyright infringements here, were willing to dismiss their claims against defendant and pursue claims solely against Amanda Foster, they were unprepared to walk away from all of their claims against the Foster family, as the family was apparently demanding. Having had no success in trying to resolve this matter, plaintiffs ultimately had no choice but to pursue all of their claims, and they filed their Amended Complaint.
- On December 7, 2005, plaintiffs obtained a default judgment against defendant's daughter, the co-defendant in this case. Thereafter, and based on the fact that they had already obtained a judgment here, plaintiffs offered to dismiss their claims against defendant with prejudice. Plaintiffs expressly agreed that defendant could preserve the issue of attorneys' fees. Defendant rejected this offer, however, apparently because she wanted to continue to pursue her counterclaim for a declaratory judgment of non-infringement, which was obviously moot.
- On March 17, 2006, plaintiffs filed their motion to dismiss with prejudice and to dismiss as moot defendant's declaratory judgment counterclaim. Defendant opposed this motion and insisted on proceeding on her counterclaim, even though it was clearly moot. This resulted in substantial additional fees for all parties.

- Finally, on July 16, 2006, this Court granted plaintiffs' motion to dismiss, dismissing plaintiffs' claims with prejudice and defendant's declaratory judgment counterclaim as moot.

See Plaintiffs' Opposition to Defendant's Motion for Attorneys' Fees (Doc. No. 143), at 3-6.

In short, contrary to the Court's finding that defendant was given no choice but to capitulate to plaintiffs' settlement demands or to litigate, beginning on April 21, 2005, plaintiffs gave defendant repeated opportunities to end this litigation without paying anything, but defendant chose to reject every such opportunity. Instead, at every turn, defendant chose to expand and continue the litigation, long after the litigation should have been dismissed. Defendant's insistence on pursuing her counterclaim for a declaratory judgment of non-infringement, even after plaintiffs had actually dismissed their underlying infringement claims, is perhaps the best example of defendant's pattern of choosing litigation over dismissal.

In these circumstances, to award defendant attorneys' fees would reward defendant for choosing to continue to litigate long after this case should have been dismissed. It would also punish plaintiffs for doing nothing more than pursuing copyright interests that were ultimately vindicated, through their own diligent efforts, when they obtained a default judgment against defendant's daughter and co-defendant in this case, who was adjudicated a willful infringer. Plaintiffs respectfully submit that an award of fees in these circumstances would run contrary to the very purposes of the fees provision of the Copyright Act that this Court itself acknowledged. See Order, at 2-3. Rather than encouraging copyright owners like plaintiffs to seek to protect their valuable copyright interests, which plaintiffs succeeded in doing in this case, it would deter copyright owners from seeking to do so, and it would compensate a defendant for maintaining litigation for the sole purpose of generating attorneys' fees in order to collect attorneys' fees. This Court should not encourage or reward the creation of such a fee-spinning machine.

For all of these reasons, to the extent that the Court awarded fees based on its assumption that defendant had no choice but to capitulate to plaintiffs' settlement demands or to litigate, plaintiffs respectfully submit that the Court's Order is erroneous and should be overturned.

**CONCLUSION**

WHEREFORE, plaintiffs respectfully request that this Court reconsider its February 6, 2007 Order awarding fees to defendant and overturn that award. Alternatively, plaintiffs respectfully request that this Court amend its findings to correct the erroneous assumptions of law and fact set forth above.

Respectfully submitted,

Dated: February 21, 2007

By: s/ Colin G. Martin

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing **PLAINTIFFS' MOTION FOR RECONSIDERATION OF THIS COURT'S FEBRUARY 6, 2007 ORDER AND BRIEF IN SUPPORT THEREOF** was served upon counsel for the defendant in the above entitled case via First Class United States mail, with postage fully paid, on the 21st day of February, 2007.

\_\_\_\_\_ s/ Colin G. Martin

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