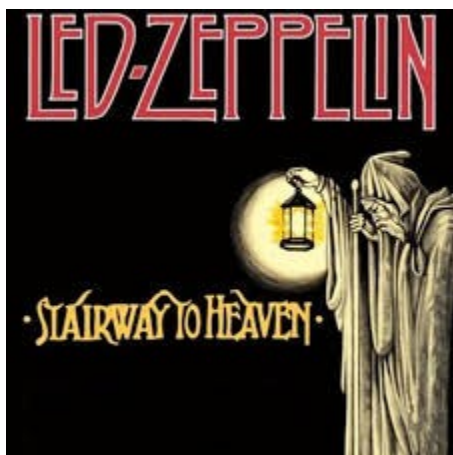


All That Glitters is Not Gold For Led Zeppelin's Claim For Attorneys' Fees

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by Bryan M. McGarry



Legendary rockers Jimmy Page and Robert Plant are probably still flying high over their defense verdict earlier this summer in the “Stairway to Heaven” copyright infringement trial. They may be slightly coming down, though, after the trial court rejected their claim for recovery of attorneys’ fees. The trial court’s ruling is one of the first to interpret the U.S. Supreme Court’s decision in Kirtsaeng v. John Wiley & Sons, Inc., a case that clarified the standard for awarding fees to the successful

party in a copyright dispute. The following is a brief explanation of why the stores are all closed for Zeppelin’s fee claim.

As we previously reported here, *Kirtsaeng* directs district courts to give “substantial weight” to the objective reasonableness of the losing party’s position, while also cautioning courts against treating this factor as dispositive. Instead, the trial court is to examine “all the circumstances of a case on their own terms, in light of the Copyright Act’s essential goals.”

There have been relatively few district court decisions issued since the Supreme Court offered this guidance. Earlier this month, the trial judge in the Zeppelin case weighed in on the issue.

In deciding whether to award attorney fees to the defendants, Judge Klausner considered and applied both the principles set forth in *Kirtsaeng*, as well as the specific five factors prescribed by the Ninth Circuit prior to *Kirtsaeng*: (1) degree of success obtained on the claim, (2) frivolousness, (3) motivation, (4) objective reasonableness of

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factual and legal arguments, and (5) the need for compensation and deterrence. On the one hand, the judge found that the first factor--degree of success--weighed in favor of granting defendants' request for fees, and the fifth factor--need for compensation--lightly favored defendant. On the other hand, he found that the second and fourth factors--frivolousness and objective reasonableness--both favored plaintiff given that plaintiff survived summary judgment and established key elements of the copyright infringement claim, namely that plaintiff owned *Taurus* and that defendants had "access" to that work. Judge Klausner also concluded that the third factor, motivation, also weighed in favor of plaintiff because plaintiff was a trustee that brought suit on behalf of Randy California's estate in order to secure credit for him.

The Ninth Circuit's five factors standing alone arguably present a close call on fees given the trial judge's conclusion that two weighed in favor of granting defendants' request for fees, and three weighed against granting the request. Following *Kirtsaeng*, however, Judge Klausner considered a sixth factor: litigation misconduct. Defendants argued that plaintiff engaged in a litany of litigation misconduct, which supported defendants' request for fees. Judge Klausner agreed, reciting specific examples of what he described as plaintiff's counsel's "tenuous grasp of legal ethics and a rudimentary understanding of courtroom decorum," and generally referencing "a litany of tasteless courtroom antics and litigation misconduct." This sixth factor, then, also weighed in favor of granting defendants' request for fees.

Notwithstanding that two of the original five Ninth Circuit factors, and a sixth "litigation misconduct" factor relevant under *Kirtsaeng*, all weighed in favor of fees, Judge Klausner declined to award fees to defendants. Instead, he concluded that because the claim was objectively reasonable, and properly motivated, fees were not appropriate.

Judge Klausner's analysis is interesting in multiple respects. He continued to apply the five Ninth Circuit factors in place prior to *Kirtsaeng*, but he also considered "litigation misconduct" as a sixth factor relevant under *Kirtsaeng*. Where, as here, the factors were evenly split, Judge Klausner considered objective reasonableness and motivation as more compelling, and he relied on his prior decision to deny summary judgment to support his conclusion that plaintiff's claim was objectively reasonable. Moreover, despite the fact that litigation misconduct was considered as one of the factors, it is not clear how much weight, if any, was given to it.