UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

YOUT LLC, Plaintiff, vs. THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. and DOE RECORD COMPANIES 1-10, Defendants.	)	Case No. 3:20-cv-01602-SRU October 31, 2022

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT RIAA'S MOTION FOR ATTORNEYS' FEES

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I. INTRODUCTION

Plaintiff Yout, LLC filed this suit against Recording Industry Association of America, Inc. ("RIAA") on the implausible claim that its stream-ripping software, which allows users to download audio and video from streaming services, does not circumvent technological measures that restrict access to digital music video files on YouTube. Yout's suit was meritless from the beginning and, after Yout's second attempt to plead viable claims, this Court dismissed Yout's complaint with prejudice because "repleading is futile." Dkt. 61 at 45. Repleading is futile because, as anyone who has ever used YouTube knows, YouTube's users can watch and listen to music videos for free on its ad-supported service, but those users cannot download digital files that contain the record companies' most valuable copyrighted works. YouTube prevents such downloads through built-in technology that safeguards underlying digital files—safeguards that Yout's stream-ripping service circumvents to access those files. Yout's conduct violates the express prohibition in YouTube's Terms of Service and is textbook circumvention.

In the face of these obvious facts, Yout brought an unreasonable suit to achieve a legally unjustified result: publicity for its illegal service and prolonging its ability to offer its users a circumvention device to illegally rip downloads of record companies' valuable copyrighted works. As long as this lawsuit (and now the appeal) are pending, Yout believes it can continue to enable circumvention and infringement of RIAA's members' valuable copyrights, including by consumers who may otherwise purchase the copyrighted sound recordings or listen to a licensed copy on an ad- or subscription-supported streaming service. Adding to this potentially irreparable harm, Yout continues to force RIAA to incur significant expense to defend this suit.

The Copyright Act discourages such objectively unreasonable lawsuits. The Court may award reasonable attorneys' fees to the prevailing party, including a prevailing defendant. 17 U.S.C. §§ 505, 1203(b)(5). In determining whether to award attorneys' fees, courts consider "(1) the frivolousness of the non-prevailing party's claims or defenses; (2) the party's motivation; (3) whether the claims or defenses were objectively unreasonable; and (4) compensation and deterrence." *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) (considering

an award under section 505); *see also Lievano v. CoinTelegraph Media USA, Inc.*, No. 1:21-cv-03255 (LGS) (SDA), 2021 WL 5532513 (S.D.N.Y. Nov. 2, 2021) (considering these factors in a fees award under section 1203(b)(5)); *Miller v. Netventure24 LLC*, No. 19-CV-7172 (LGS) (BCM), 2021 WL 3934262 (S.D.N.Y. Aug. 6, 2021) (same). Each factor weighs decisively in favor of awarding RIAA's attorneys' fees.

RIAA seeks an attorneys' fee award of $250,000, plus additional amounts spent on this motion. This request for attorneys' fees is conservative, both as a matter of attorney rates and the time requested, and is much lower than the amount that would be calculated using a traditional lodestar analysis and lower than the amount of fees actually paid. RIAA tried numerous times to reach out to counsel for Yout to discuss resolution of this motion and matter, but Yout's counsel responded that he no longer represents Yout and has since filed a notice of appeal. Meanwhile, Yout has continued to offer its circumvention technology.

RIAA respectfully requests that the Court grant its motion for attorneys' fees.

II. BACKGROUND

This lawsuit ostensibly started because RIAA exercised its right to notify Google of Yout's circumvention software. RIAA's members have license agreements with Google that permit the advertising-supported streaming of their copyrighted sound recordings on YouTube, one of the world's most popular streaming services in the world. Consistent with protecting copyright owners' rights, YouTube does not allow its users to freely download music videos—there is no download button or other feature that would permit someone to easily make a copy of the underlying digital files. In fact, YouTube's Terms of Service prohibit users from "circumvent[ing], disabl[ing], fraudulently engag[ing] with, or otherwise interfer[ing] with any part of the Service . . . including . . . features that (a) prevent or restrict the copying or other use of Content or (b) limit the use of the Service or Content." Dkt. 49-2 at 6. Those same terms also prohibit "access[ing], reproduc[ing], [or] download[ing]" content without "prior written permission from YouTube and, if applicable, the respective rights holders." Dkt. 49-1 at 5.

In October 2019 and June 2020, RIAA sent notices to Google indicating that "[t]o [RIAA's] knowledge, [Yout's website] provide[s] access to a service (and/or software) that circumvents YouTube's rolling cipher, a technical protection measure, that protects our members' works on YouTube from unauthorized copying/downloading." Dkt. 45 ¶¶ 83–88. Google subsequently delisted Yout from search results. *See id.* ¶ 174.

There was nothing remarkable or controversial about RIAA's notice to Google. Yout knows very well that its service is illegal. Before Yout filed this lawsuit (and since), courts around the world had found that Yout's software is a circumvention tool that violates their countries' respective laws. *See, e.g.*, Chris Cooke, *Danish courts block stream-ripping site Yout.com despite it employing the "but we don't copy anything" defence*, Complete Music Update (Apr. 27, 2020), https://completemusicupdate.com/article/danish-courts-block-stream-ripping-site-yout-comdespite-it-employing-the-but-we-dont-copy-anything-defence/; *Italian court confirms stream ripping is illegal*, IFPI (Aug. 2, 2019), https://www.ifpi.org/italian-court-confirms-stream-ripping-is-illegal/. Indeed, in Brazil, prosecutors have filed a criminal complaint against the site. *See* Chris Cooke, *Yout blocked in Brazil again following criminal copyright complaint*, Complete Music Update (Nov. 25, 2021), https://completemusicupdate.com/article/yout-blocked-in-brazil-again-following-criminal-copyright-complaint/. Yout's service has also been blocked in Peru and Spain. *See* Chris Cooke, *Stream-ripper Yout continues to fight web-blocks around the world, with mixed success*, Complete Music Update (Mar. 3, 2022), https://completemusicupdate.com/article/stream-ripper-yout-continues-to-fight-web-blocks-around-the-world-with-mixed-success/.

Yout, seeking to prolong and promote its illicit business of offering stream-ripping technology, decided to file this meritless suit. Yout sought money from RIAA based on the false and implausible assertion that RIAA defamed and disparaged Yout when it told Google that Yout was illegal stream-ripping technology. Ironically, Yout then amplified that message by seeking out news coverage of this litigation. In reality, it seems that Yout believed it could attract new users and attempt to obscure the blatantly illegal nature of its service by publicizing

the lawsuit. As Yout intended, websites like Torrent Freak have regularly covered this lawsuit, and Yout's founder has promoted those articles. *See* Aminirad Decl. Ex. 3.

To delay resolution of this case, Yout took unreasonable positions to try to manufacture a disputed issue of fact. For example, Yout argued that only a copyright holder could provide a technical measure under the DMCA, 8/25/22 Tr. at 24:5–15, 33:14–21; that any streaming service that made songs publicly available was ineligible for protection under the DMCA, *id.* at 24:17–22; that YouTube had no technical measure to prevent downloading despite admitting that downloading required applying a process and "modif[ying] [a] signature value," *id.* ¶ 21:3–16, 33:14–21; and that YouTube's decision not to include a download button was somehow "not a measure to restrict the ability to download," *id.* at 35:4–10. All the while, Yout refused to explain how its technology worked, for the obvious reason that such an explanation would show incontrovertibly that Yout's technology does circumvent YouTube's technology preventing download of its videos.

In granting RIAA's motion to dismiss, this Court found that Yout's own allegations failed to plausibly plead that it does not violate section 1201. Dkt. 61 at 40. The Court further found that it was "self-evident" from the Second Amended Complaint that "YouTube does not readily offer a download button or another feature by which the user may access a downloadable

audio or video file," and that the ordinary user is not accessing downloadable files in the ordinary course. Dkt. 61 at 20, 27.

III. ARGUMENT

The Court should exercise its discretion to award RIAA its attorneys' fees under section 505 of the Copyright Act as the prevailing party. A fee award is appropriate and justified here. Yout's claims were objectively unreasonable, if not frivolous, because Yout's own allegations failed to establish that it was not violating the law. Evidence further suggests that Yout brought this lawsuit, not in good faith, but to prolong and advertise its stream-ripping business. In doing so, Yout caused RIAA to incur significant legal fees to defend this lawsuit and protect its members' rights. The purpose of the Copyright Act, as well as the need for compensation and deterrence, strongly favor awarding fees. RIAA seeks a conservative fee award, discounted from the lodestar and the actual amounts paid.

A. The Court Should Exercise Its Discretion To Award RIAA Attorneys' Fees

1. The Copyright Act Authorizes RIAA's Motion

Pursuant to section 505, a district court may award reasonable attorneys' fees to the prevailing party, including to a prevailing defendant, "[i]n *any* civil action under [Title 17] . . . [e]xcept as otherwise provided by this title." 17 U.S.C. § 505 (emphasis added). Section 505 further permits a fee award in declaratory relief actions that seek construction of a provision in Title 17 or concern the scope of rights under copyright law. *See 16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 263 (2d Cir. 2015) (fees available under section 505 where party sought declaratory judgment that it had not infringed a copyright); *Doc's Dream, LLC v. Dolores Press, Inc.*, 959 F.3d 357, 360–62 (9th Cir. 2020) (fees available under section 505 where party sought declaratory judgment concerning scope of copyright); *Horror Inc. v. Miller*, No. 3:16-cv-1442 (SRU), 2022 WL 4473426, at *2 (D. Conn. Sept. 26, 2022) (fees available under section 505 where party sought declaratory judgment concerning construction of termination provisions); *see also* 4 Nimmer on Copyright § 14.10[B][1][b] & n.13 (2022) (fees under section 505 available "any time the action at hand requires construction of the Copyright Act" and noting parallels to

federal jurisdiction analysis); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (for purposes of federal jurisdiction, an action "arises under" copyright law if the "complaint . . . asserts a claim requiring construction of [Title 17]").

Section 505 applies here. Yout asserted a declaratory relief claim concerning the construction of section 1201, as well as a claim under section 512(f). Both sections are "under [Title 17]," and therefore fall within the plain language of section 505. No provision in Title 17 provides otherwise.

The fact that section 512(f) and section 1203(b)(5) also provide for the recovery of certain fees does not change the analysis. For a statute to "provide[] otherwise," or "otherwise provide" as phrased in section 505, the statute must provide for a contrary result. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 377–78 (2013) ("[a] statute providing that 'the court may award costs to the prevailing party,' for example, is not contrary to the Rule because it does not limit a court's discretion"). Section 1203(b)(5), like section 505, provides that the court *may* award fees in its discretion, and is therefore not contrary (and as discussed below, provides an alternative basis for a fee award). Section 512(f) allows as damages for the recovery of costs and attorneys' fees that a party incurs as a result of the service provider taking some action in reliance on the misrepresentation in violation of section 512(f), but it is not a fee-shifting statute and neither replaces nor is contrary to section 505. *See Lenz v. Universal Music Corp.*, No. 07-cv-3783 (JF), 2010 WL 702466, at *11 (N.D. Cal. Feb. 25, 2010) (holding that while section 512(f) permits recovery of pre-litigation fees proximately caused by service provider's reliance on the misrepresentation, it is not a fee-shifting statute and attorneys' fees for the prevailing party in the civil action remain available under section 505).

Section 1203(b)(5) provides an alternative basis for a fee award. That section permits a district court to award reasonable attorneys' fees to the prevailing party in an action brought under section 1203(a), which provides a private right of action for section 1201 violations. 17 U.S.C. § 1203(a), (b). No court has yet addressed the application of section 1203 in awarding fees to a prevailing defendant in a declaratory judgment action under section 1201.

Nevertheless, the same reasoning the Second Circuit applied in *16 Casa Duse*, in which the Second Circuit concluded that section 505 permitted fees in a declaratory judgment action alleging non-infringement under section 501, requires a similar result with respect to section 1203: fees are permitted in a declaratory judgment action alleging non-circumvention under section 1201. 791 F.3d at 263; *see also* 4 Nimmer on Copyright§ 14.10[B][1][b]; *compare* 17 U.S.C. § 1203(a) (person injured by violation of section 1201 may bring a civil action), *with id.* § 501(b) (copyright owner entitled to institute an action under section 501 for copyright infringement). Either section 505 or section 1203 is the basis for a fee award here.

2. RIAA Is The Prevailing Party And All Of The Factors Favor Awarding Attorneys' Fees

In determining whether to award attorneys' fees to the prevailing party under the Copyright Act, courts consider several nonexclusive factors, including "(1) the frivolousness of the non-prevailing party's claims or defenses; (2) the party's motivation; (3) whether the claims or defenses were objectively unreasonable; and (4) compensation and deterrence." *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994)); *Zuma Press, Inc. v. Getty Images (US), Inc.*, 845 F. App'x 54, 59 (2d Cir. 2021) (same factors under section 1203(b)(5)); *Stross v. T-N-B Marble-N-Granite LLC*, No. 3:19 CV 688 (RNC), 2019 WL 13217306, at *4 (D. Conn. Nov. 1, 2019); *Farrington v. Sell It Social, LLC*, No. 18 Civ. 11696 (JPC), 2020 WL 7629453, at *3 (S.D.N.Y. Dec. 21, 2020) (same). Courts have broad discretion and may award attorneys' fees based on a combination of the factors, or only one. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 208-09 (2016) ("[A] court may award fees even though the losing party offered reasonable arguments . . . [o]r a court may do so to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims, again even if the losing position was reasonable in a particular case.").

As a threshold matter, there is no dispute that RIAA is the prevailing party. The Court granted RIAA's motion and dismissed the Second Amended Complaint with prejudice. Dkt. 61

at 1, 44–45. Moreover, each factor weighs decisively in favor of a full award of attorney's fees here. Yout's claims were frivolous and objectively unreasonable, failing as a matter of law. Yout acted in bad faith, bringing a meritless lawsuit to promote its stream-ripping service and to achieve a legally unjustified result: prolonging its continued violation of the DMCA to promote infringement of RIAA members' copyrights. In doing so, Yout caused the RIAA to incur significant legal fees to defend this frivolous suit and protect its members' rights. RIAA has not been compensated in any way for this unnecessary expense, nor, without an award of attorneys' fees, will Yout have sustained any penalty for violating the DMCA. Attorneys' fees are appropriate in this case.

(a) Yout's Claims Were Either Frivolous Or Objectively Unreasonable And It Made Similarly Baseless Arguments To The Court

The Court should award RIAA its attorneys' fees on the basis alone that Yout asserted objectively unreasonable and frivolous claims and arguments, which are the first and third *Fogerty* factors. "[O]bjective reasonableness . . . should be given substantial weight in determining whether an award of attorneys' fees is warranted." *Matthew Bender & Co. v. West Pub. Co.*, 240 F.3d 116, 122 (2d Cir. 2001). Attorneys' fees are frequently awarded not only where the losing party filed an unreasonable claim, but also where the party "took unreasonable positions" in attempting to support its claims. *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 327 F. Supp. 3d 606, 642 (S.D.N.Y. 2018).

A lawsuit is objectively reasonable if it has "a reasonable basis in law and fact." *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 108 (2d Cir. 2014). Conversely, a lawsuit or litigation position is objectively unreasonable if it has "no legal or factual support." *Hughes v. Benjamin*, No. 17-CV-6493 (RJS), 2020 WL 4500181, at *3 (S.D.N.Y. Aug. 5, 2020) (citation omitted). A litigant's "failure to cite . . . any meritorious . . . claims remotely resembling [its] own bolsters that conclusion" that the litigant's position was objectively unreasonable. *Nobile v. Watts*, 747 F. App'x 879, 882 (2d Cir. 2018) (affirming an award of attorneys' fees in a case dismissed for failure to state a claim).

Here, Yout's section 1201 claim lacked legal and factual support. Yout claimed that its software platform, which permitted users to download mp3 and mp4 files of YouTube videos, did "not circumvent any technological measure on YouTube videos." SAC ¶¶ 38–39, 95. But as this Court found, based on 'Yout's own allegations, "[i]t is *self-evident*" that "YouTube does not readily offer . . . [a] feature by which the user may access a downloadable audio or video file," and yet Yout's program "creates downloadable files of streaming content." Dkt. 61 at 20 (emphasis added). Yout "facially allege[d] that its platform accomplishes a task contrary to YouTube's restraints." *Id*. As this Court found, there was no question that "Yout's technology *clearly* 'bypasses' YouTube's technological measures." *Id.* at 32 (emphasis added).

Yout resisted these obvious facts, even when pressed at oral argument on RIAA's second motion to dismiss. When the Court observed that YouTube videos are "available to stream, not to download," extraordinarily, counsel for Yout said, "Well, I would disagree with that. . . . [T]he file itself is on YouTube's platform." 8/25/22 Tr. at 20:25–21:10. Counsel for Yout insisted that "[o]ur position is that there is no technical measure," *id.* at 33:20–21, and argued that YouTube's decision not to include a download button was somehow only for bandwidth purposes and "not a measure to restrict the ability to download," because a user could obtain a downloadable copy by following a highly complex process in developer tools, *id.* at 34:24–35:10.

Yout repeatedly refused to answer how Yout's technology worked, despite the Court's observation that the way Yout worked was important for determining whether "there is or is not a technological measure," *id.* at 46:6–11, and despite the fact that the Court had allowed Yout to try to re-plead such facts after dismissing Yout's Complaint without prejudice the first time. Instead, Yout asserted that the answer was "proprietary," *id.* at 50:14, and offered two completely dissimilar analogies for how the technology worked. First, in their Second Amended Complaint, Yout claimed that its service "automated" a complex series of steps using developer tools. SAC ¶¶ 56, 79, 91, 102. Then, in oral argument, counsel for Yout asserted that the "better" comparison for Yout's service is that "[i]f I watch something on YouTube, I can open QuickTime player and do a screen recording and capture the entire video and audio of that

YouTube file. So the YouTube file is publicly accessible . . . ." 8/25/22 Tr. at 21:21–22:1, 42:5–17. As a logical matter, both cannot be true.

Yout also argued for extreme and unsupported interpretations of the law. For instance, Yout argued that "under 1201(a) and (b), the technical measure [must be] from the copyright owner," not from YouTube. *Id.* at 24:5–15. When the Court pointed out that Yout's arguments would mean that "any streaming service has no protection from [the DMCA]," counsel for Yout agreed, for "[a]ny streaming service that publicly makes a copyright or makes a copyrighted work publicly available." *Id.* at 24:17–22. Yout's position appears to be that by licensing copyrighted works for advertising-supported streaming available to the public for viewing, copyright owners somehow waived their ability to protect the underlying digital files from access and copying, whether or not they used TPMs to do so.

In short, this Court already found that Yout's claims lacked legal and factual support. Attorneys' fees should be awarded on this important basis alone. *Bauer v. Yellen*, 375 F. App'x 154, 156 (2d Cir. 2010) (objective unreasonableness, alone, supports section 505 award); *Miroglio S.P.A. v. Conway Stores, Inc.*, 629 F. Supp. 2d 307, 311 (S.D.N.Y. 2009) (same).

(b) Yout Engaged In Bad Faith Litigation Conduct, Evincing Improper Motivation

The Court should also award attorneys' fees because Yout initiated this lawsuit in bad faith. The evidence suggests that Yout was motivated by a desire to publicize its illegal website, prolong its illegal DMCA violations, and counter the press regarding numerous international decisions concluding the Yout service is illegal. This factor weighs heavily in favor of an attorneys' fee award. "[T]he presence of [an] improper motivation in bringing a lawsuit or other bad faith conduct weighs heavily in favor of an award of costs and fees." *Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351, 357 (S.D.N.Y. 2006). The "evidence of bad faith" need not be "conclusive" in order to justify an award of attorneys' fees on the basis of motivation. *Shame on You Prods. v. Banks*, 893 F.3d 661, 668 (9th Cir. 2018).

First, Twitter posts by Yout's founder, Johnathan Nader, indicate that Yout had an ulterior motive in filing this lawsuit. Yout intended to publicize and promote its stream-ripping service. According to Yout, Google has delisted its software platform, making "its software platform undiscoverable to its users." SAC ¶ 141. But by suing RIAA and making news headlines, Yout could find a new way to publicize its service to new users. Indeed, news sources like Torrent Freak have regularly reported on this lawsuit, as well as other legal action against Yout across the world. *See, e.g.*, Ernesto Van der Sar, *YouTube Ripper Strikes Back at the RIAA in DMCA 'Circumvention' Lawsuit*, Torrent Freak (Dec. 3, 2021), https://torrentfreak.com/youtube-ripper-strikes-back-at-the-riaa-in-dmca-circumvention-lawsuit-211203/; Andy Maxwell, *RIAA Sued By YouTube-Ripping Site Over DMCA Anti-Circumvention Notices*, Torrent Freak (Oct. 27, 2020), https://torrentfreak.com/riaa-sued-by-youtube-ripping-site-over-dmca-anti-circumvention-notices-201027/. Mr. Nader has frequently retweeted the articles, proclaiming that he had "made the news today" and that Yout was "emboldened." Aminirad Decl. Ex. 3.

Second, evidence suggests that Yout's motivation in bringing this lawsuit was to prolong its violations of the DMCA. As Yout acknowledges, "[t]his lawsuit stems from a series of notices sent by [RIAA] on behalf of its member companies to Google." Dkt. 55 at 1. Yout profits from its illicit service through a subscription format. Dkt. 55 at 5. In response to RIAA's notice, Google de-listed yout.com, "caus[ing] Yout's subscription customers to cancel subscriptions." *Id*. Yout filed this meritless suit to counter these notices, in the hopes of either becoming re-listed or generating publicity to attract new users, and thereby continuing to circumvent technological measures in violation of the DMCA and facilitate violations of RIAA members' copyrights.

Third, Yout appears to have been motivated by a desire to counter the correct and widespread public narrative that its service is illegal. Before Yout filed this lawsuit, numerous foreign courts had found that Yout's software violated those countries' respective anti-circumvention laws. *See, e.g.*, Chris Cooke, *Danish courts block stream-ripping site Yout.com*

despite it employing the "but we don't copy anything" defence, Complete Music Update (Apr. 27, 2020), https://completemusicupdate.com/article/danish-courts-block-stream-ripping-site-yout-comdespite-it-employing-the-but-we-dont-copy-anything-defence/; *Italian court confirms streamripping is illegal*, IFPI (Aug. 2, 2019), https://www.ifpi.org/italian-court-confirms-streamripping-is-illegal/. In the United States, Yout apparently decided to strike first, so as to counter this narrative and to prolong its wrongdoing.

Lastly, pursuing litigation that "ignore[s] the law" in the hopes of achieving "a legally unjustified" result is bad faith justifying an award of fees. *Baker*, 431 F. Supp. 2d at 358; *see also Crown Awards, Inc. v. Discount Trophy & Co.*, 564 F. Supp. 2d 290, 292 (S.D.N.Y. 2008) (finding that attorneys' fees were necessary where the losing party "tried to make [a case] needlessly complicated" by filing "meritless" claims or "groundless" motions). As detailed above, Yout's case was meritless, without legal or factual support.

Yout's improper motivation and bad faith conduct weighs in favor of an award of attorneys' fees.

(c) The Purposes Of The Copyright Act, As Well As The Need For Compensation And Deterrence, Strongly Favor Awarding Fees

The Court may also consider the "purposes of the Copyright Act" and the importance of "compensation and deterrence" in awarding fees if doing so is "faithful" to those goals. *Fogerty*, 510 U.S. at 534 n.19.

Attorneys' fees are necessary here to adequately compensate RIAA and further the purposes of the Copyright Act. Yout's stream-ripping service causes serious harm to RIAA members by facilitating unauthorized ripped downloads of record companies' most valuable copyrights. Those copies could then be further disseminated on the internet, exacerbating the harm of the initial piracy. RIAA's members have rights to bring affirmative infringement and circumvention claims against Yout, but that does not alleviate the burden this suit has imposed on RIAA, which could have spent the time and resources on other anti-piracy work. Yout caused RIAA to incur significant legal fees to respond to Yout's frivolous claims.

Attorneys' fees are also necessary here to deter Yout and similar stream-ripping services from bringing frivolous lawsuits in an attempt to prolong their DMCA violations. Yout's illicit business is directly contrary to Congress's purpose in adopting the DMCA. The Copyright Act provides copyright holders the exclusive right to distribute copies of their copyrighted works. *Mazer v. Stein*, 347 U.S. 201, 219 (1954). By enacting the DMCA and prohibiting circumvention of technological protective measures, Congress protected these exclusive rights from the ease with which pirates could copy and distribute a copyrightable work in digital form. *Universal City Studios, Inc. v. Corley*, 273F.3d 429, 435 (2d Cir. 2001). Yout's stream-ripping service, which allows users to make unauthorized downloads of RIAA's members' valuable copyrights, is precisely the ill Congress adopted the DMCA to combat.

Attorneys' fees are necessary here to deter Yout and similar stream-ripping services from making baseless claims that they do not violate DMCA and to compensate RIAA for the cost of defending this suit.

B. RIAA's Requested Fees Are Reasonable

RIAA's request for $250,000 in attorneys' fees is reasonable. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 186 (2d Cir. 2008) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). This calculation is the "lodestar" and supplies a "presumptively reasonable fee." *Id*. at 183.

1. RIAA's Attorneys' Rates Are Reasonable

The RIAA's attorneys' requested rates are reasonable. RIAA seeks approval for a rate of $875/hour for Ms. Ehler and a blended associate rate of $630/hour, both of which are already

discounted from the rates typically charged.[1] A reasonable hourly rate is the amount that "a reasonable, paying client" would be willing to pay, based on the *Johnson* factors: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorneys' customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Arbor Hill*, 522 F.3d at 184, 186 n.3 (citing *Johnson v. Georgia Hwy. Express, Inc.* 488 F.2d 417, 717–19 (5th Cir. 1974)). The requested rates are those agreed to by the RIAA. The *Johnson* factors also support RIAA's attorneys' requested rates here.

Time. The first factor, the time and labor required to defend RIAA, support counsel's rates and are detailed in the records submitted in support of this motion. Counsel spent significant time on this lawsuit and are seeking reimbursement for only a portion of that time. The time sought here—364.2 hours—is reasonable for ongoing investigation and litigation work as well as briefing and arguing two motions to dismiss over two years. Ms. Ehler attested that, based on her ten years of experience litigating copyright and other civil cases, the number of hours expended was reasonable. Ehler Decl. ¶¶ 9–10. The relatively modest expenditure of time and labor reflects the skill of the attorneys on the matter and their deep familiarity with copyright law and demonstrates the reasonableness of the rates requested.

[1] To be conservative, this motion does not seek reimbursement for Mr. Pomerantz's or Mr. Klaus's time. The rates for senior partners Mr. Pomerantz and Mr. Klaus are significantly higher than those sought for Ms. Ehler here.

Ms. Ehler also attested that, based on her experience, the number of attorneys and support staff was reasonable and necessary to the needs of the case and consistent with both firm and peer firms' practice in comparable cases. Ehler Decl. ¶ 11. Counsel for RIAA took care to ensure that attorneys and staff performed their work efficiently and that work was not duplicated; for the majority of the time this case has been pending, just one partner and one associate have been primarily responsible for day-to-day work on this case. Ehler Decl. ¶¶ 7–8. These reasonable and efficient practices weigh in favor of the reasonableness of the rates requested.

Difficulty and Level of Skill Required. The second and third factors, the difficulty and level of skill required, also weigh strongly in favor of the reasonableness of RIAA's counsel's rates.

The novel procedural posture of this case—in which Yout asserted a declaratory relief claim that it did *not* violate section 1201—made it difficult (and thus required skill) to succeed on a motion to dismiss, which was limited to Yout's own allegations in the complaint.

While Yout's positions in this litigation were objectively unreasonable, Yout's audacious legal and factual positions, if accepted, would threaten the recording industry's core business. As the Court observed, had Yout prevailed, "any streaming service [would have] no protection from [the DMCA]." 8/25/22 Tr. at 24:17–22. Such a ruling would do untold damage to the recording industry. In the first half of this year, streaming accounted for $6.5 billion, 84% of the recording industry's total revenue. *See* Joshua P. Friedlander, Mid-Year 2022 RIAA Revenue Statistics, https://www.riaa.com/wp-content/uploads/2022/09/Mid-Year-2022-RIAA-Music-Revenue-Report-1.pdf. Had Yout prevailed in this suit, the recording industry could have lost highly significant legal protections against piracy's threat to the recording industry's principal source of revenue.

For example, Yout brought this suit at the same time as RIAA's members were pursuing a suit against Tofig Kurbanov, the owner of two massively popular stream-ripping sites that operate in a similar fashion to Yout and have inflicted enormous damage on the recording industry. *See UMG Recordings, Inc. v. Kurbanov*, 1:18-cv-00957 (CMH) (E.D. Va. Feb. 10, 2022). RIAA's members prevailed in that case and statutory damages were assessed against the defendant in the amount of $82,922,500. *Id*. at *2. An unfavorable ruling in this matter could have undermined the record companies' legal position in that suit, making it harder to enforce their members' copyrights against a massive violator and stem the significant financial damage those violations caused. Kurbanov's sites are just two of many stream-ripping services, and even more would follow without effective protection of streaming by the DMCA.

Prevailing in this litigation, and ensuring that the DMCA remains an effective means for furthering the Copyright Act's purpose in the recording industry's principal market, was thus absolutely essential to the industry and demanded the highest level of legal skill.

Preclusion of Employment. The fourth factor, preclusion of employment, supports counsel's rates. As reflected in the records submitted in support of this motion, counsel expended significant time and labor to defend RIAA, which could not be spent for other purposes on behalf of the client or another client.

Customary Rates and Fee Arrangement. The fifth (customary hourly rate) and sixth (fee arrangement) *Johnson* factors also support counsel's rates. RIAA requests an hourly rate for Ms. Ehler and a blended hourly rate for associates that is significantly less than the customary fee charged by many of RIAA's counsel, including counsel here, and that is consistent with rates other courts have found to be reasonable rates in the jurisdiction considering the skill and experience of counsel. Specifically, RIAA requests an hourly rate of $875 for Ms. Ehler and

$630 for associates. Ehler Decl. ¶ 19. The rates sought thus represent a significant discount from counsel's typical rates. *Id.* Counsel's typical rates—rates higher than those sought here—are, considering peer firms in California and comparable markets, "reasonable and on par with (if not generally lower than) prevailing market rates for attorneys and support staff at comparable law firms." Ehler Decl. ¶ 17; *see also* Ehler Decl. ¶ 20, Ex. C. These discounted, blended rates are particularly appropriate here in light of the credentials and significant professional experience of counsel to the RIAA. *See* Ehler Decl. ¶¶ 5, 6, 18, Ex. A.

Stakes and Results. The eighth factor (stakes and results) further militates in favor of the requested rates. The "degree of success obtained" is "the most critical factor" in determining the reasonableness of a fee award. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). Here, Yout's lawsuit threatened to undermine the online streaming market for music. Stream-ripping is the latest frontier in circumvention technologies, like the DVD CSS de-encryption that proceeded it. But if Yout's software somehow did *not* violate the DMCA, record companies would be faced with serious questions about whether and how to permit streaming of their copyrighted works. The stakes were therefore high, and a complete dismissal on the pleadings meant that RIAA achieved total success. In such a case, where "the results achieved were excellent, . . . there is no basis for a reduction" in the requested rates. *Miroglio S.P.A. v. Conway Stores, Inc.*, 629 F. Supp. 2d 307, 316 (S.D.N.Y. 2009).

Attorneys' Experience and Reputation. The experience and reputation of RIAA's counsel (ninth factor) also supports the requested rates. The rates are justified given each attorney's background and level of experience. Ms. Ehler is a highly experienced partner with specialties in copyright law and piracy matters for the entertainment industry, and Ms. Ehler has been repeatedly recognized for her legal work in the intersection between entertainment and new

technologies, including in *Variety*, the *Daily Journal*, and *Law360*. Ehler Decl. ¶ 6. Ms. Ehler has successfully litigated major copyright and piracy matters for entertainment industry clients. For example, Ms. Ehler represented several studios in a suit bringing Copyright Act and DMCA claims against VidAngel to trial, winning a $62.4 million jury verdict. *See Disney Enters., Inc. v. VidAngel, Inc.*, No. 2:16-cv-04109 (AB), Dkt. 494 (C.D. Cal.). Ms. Ehler also has represented members of the Motion Picture Association and other plaintiffs in important anti-piracy work, including obtaining permanent injunctions and frequently large damages awards against pirate streaming services and their operators. *See, e.g.*, *Paramount Pictures Corp., et al. v. Does 1-10 d/b/a PrimeWire*, No. 2:21-cv-09317-MCS-SK (C.D. Cal.) (permanent injunction, motion for statutory damages pending); *Disney Enters., Inc. v. TTKN Enters., LLC d/b/a Crystal Clear Media*, No. 2:20-cv-07274 (C.D. Cal.) (preliminary and permanent injunction, $40 million stipulated judgment); *Paramount Pictures Corp. v. Omniverse One World Television, Inc.*, No. 2:19-cv-01156-MWF-ASx (C.D. Cal.) (permanent injunction and $50 million stipulated judgment). RIAA's counsel's law firm, Munger, Tolles & Olson LLP, is known for handling particularly complicated litigation matters and is currently ranked number one on the *American Lawyer*'s "A-List," a ranking of the top 20 of the nation's most elite law firms. Ehler Decl. ¶ 3. The firm is also ranked by Chambers and Partners for having the best Media & Entertainment: Litigation and Intellectual Property: Trademark, Copyright & Trade Secrets groups in California. *Id.* ¶ 4. Both Mr. Pomerantz and Mr. Klaus are ranked in Band 1. *Id.* ¶ 9.

Awards in Similar Cases. Lastly, the twelfth *Johnson* factor (awards in similar cases) supports the requested rates. The Court here should look to the rates charged in the Southern District of New York and the Central District of California, as these are the locations where most (if not nearly all) clients in complex copyright matters hire their counsel. Ehler Decl. ¶ 20 & Ex.

B (AIPLA Report). Yout itself retained Chicago-based counsel to initiate this litigation and prosecute it. *Cf. Horror, Inc.*, 2022 WL 4473426, at *5 n.3 (movant overcomes presumption of forum rule by showing that Plaintiffs "initiated this litigation and retained out-of-district counsel to prosecute it . . . . themselves demonstrat[ing] that a paying client would be willing to pay out-of-district rates").

The requested rates of $875 for Ms. Ehler and $630 for associates is consistent with typical rights for intellectual property practitioners in New York and Los Angeles, particularly given recent rises in inflation. According to a report prepared by the American Intellectual Property Law Association, the 2021 market rate for experienced intellectual property partners was $980 to $1,150/hour in the New York area and $780 to $1,200/hour in Los Angeles. Ehler Decl. Ex. B. This Court recently awarded fees of $795/hour for a partner and $586/hour for an associate in a copyright case for work from 2016 to 2021. *Horror, Inc.*, 2022 WL 4473426, at *6-7. Courts in the Southern District of New York and in the Central District of California have found similar rates reasonable for attorneys in that jurisdiction in copyright cases. *See, e.g.*, *Amusement Art, LLC v. Life is Beautiful, LLC*, Case No. 2-14-cv-08290-DDP-JPR, 2017 WL 2259672, at *5–6 (C.D. Cal. May 23, 2017) (approving rates of $865 per hour for partner and $530 per hour for associate), *vacated in part on other grounds*, 768 F. App'x 683 (9th Cir. 2019); *Beastie Boys v. Monster Energy Co.*, 112 F. Supp. 3d 31, 56 (S.D.N.Y. 2015) (approving partner rates of $675 per hour and junior associate rates of $461–$505 per hour); *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB (SHx), 2015 WL 1746484, at *15 (C.D. Cal. Mar. 24, 2015) (partner rates of $825–$930 per hour and associate rates of $350–$690 per hour reasonable; support staff rates of up to $345 reasonable).

Lastly, "the actual rate that [the attorney] can command in the market is itself highly relevant proof of the prevailing community rate." *Perfect 10*, 2015 WL 1746484, at *18. The rates requested are those agreed to by RIAA and the total amount is lower than fees actually paid. Ehler Decl. ¶¶ 19, 25.

2. The Total Number Of Hours For Which RIAA Seeks Fees Is Reasonable

This motion is supported by counsels' contemporaneous, itemized billing records. As explained in the attached Aminirad Declaration, counsel recorded time contemporaneously with detailed entries specifying the nature of the work done. Aminirad Decl. ¶ 2. These records meet the requirements for documenting counsel's time. *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983) ("[A]ny attorney . . . who applies for court-ordered compensation in this Circuit . . . must document the application with contemporaneous time records . . . specify[ing], for each attorney, the date, the hours expended, and the nature of the work done.")

Counsel's time is proportional to the needs of the case and Yout's litigation strategy. Counsel for RIAA took care to ensure that attorneys and staff performed their work efficiently and that work was not duplicated; for the majority of the time this case has been pending, just one partner and one associate have been primarily responsible for day-to-day work on this case. Ehler Decl. ¶¶ 7–8. This reasonable approach is reflected in the time spent defending this dispute. Based on Ms. Ehler's ten years of experience litigating copyright and other civil cases, the approximately 364.2 hours RIAA is seeking in reimbursement for defending this suit was reasonable. Ehler Decl. ¶¶ 10–11.

The amount of time spent defending the suit is particularly reasonable in light of the amount of work required by the suit over nearly two years:

Complaint and First Motion to Dismiss. Yout initiated this action on October 25, 2020. Dkt. 1. Shortly thereafter, on December 14, 2020, Yout filed a First Amended Complaint. Dkt. 9. RIAA made a motion to dismiss and drafted a memorandum in support of the motion. Dkt.

28. RIAA also prepared a reply in support of the motion. Dkt. 39. The Court held a hearing on the motion on August 5, 2021. Dkt. 41. The Court granted RIAA's motion and dismissed the complaint without prejudice. Dkt. 42.

Rule 26(f) Report and Initial Disclosures. The parties filed a joint Rule 26(f) report on January 25, 2021, Dkt. 29, and the Court held a Rule 16 pretrial conference on February 1, 2021, Dkt. 33. The parties agreed to stay most discovery deadlines pending resolution of the pleadings.

Second Motion to Dismiss. Yout filed a Second Amended Complaint on September 14, 2021. Dkt. 45. The Second Amended Complaint, however, suffered from the same defects on which the Court had granted RIAA's initial motion to dismiss. On October 20, 2021, RIAA again moved to dismiss on the same grounds, Dkt. 49, and subsequently filed a reply, Dkt. 56. The Court had a hearing on the motion on August 25, 2022. On September 30, 2022, the Court granted RIAA's motion to dismiss and entered judgment. Dkts. 61, 62.

Attorneys' Fees Motion. RIAA also seeks its fees associated with preparing the present motion, based on an hourly rate. RIAA will submit a supplemental declaration with any reply.

The time expended by counsel for which RIAA seeks reimbursement is particularly reasonable because RIAA's request does not cover all the fees that Yout forced them to incur. In particular, RIAA has omitted any time billed by Mr. Pomerantz and Mr. Klaus, despite the fact that they played a key role in role in strategic guidance and briefing. Ehler Decl. ¶ 26; Aminirad Decl. ¶ 6. RIAA has also omitted the time billed by its local counsel at Wiggin and Dana LLP. Ehler Decl. ¶ 26; Aminirad Decl. ¶ 7. RIAA has further omitted time entries associated with settlement or mediation and obtaining copies and translations of foreign court decisions involving Yout. Aminirad Decl. ¶ 8. Rather, RIAA has limited the request to activity that was central to prosecuting its case and responding to Yout's complaint, including analyzing the complaint, drafting two motions to dismiss, drafting initial disclosures, and the motion for attorneys' fees. Aminirad Decl. Ex. 1.

The time for which RIAA seeks fees is reasonable and proportionate to the case.

3. RIAA's Requested Fees Reflect A Significant Discount From The Lodestar Amount

RIAA requests a total of $250,000 in fees, which reflects an additional discount from the lodestar amount. RIAA does not request fees for Mr. Pomerantz's and Mr. Klaus's work on the case, despite the important role their strategic guidance and work on the briefing played in the RIAA's success in this case. RIAA also does not request fees for work done by Mr. James Craven and Mr. David Norman-Schiff from Wiggin and Dana LLP, who served as local counsel and spent more than 48 hours in connection with defending this case. Aminirad Decl. ¶ 7. The requested fees are less than what was actually paid to litigate this case. Ehler Decl. ¶ 26.

CONCLUSION

RIAA respectfully requests that the Court grant its motion and award it $250,000 in attorneys' fees thus far, and additional fees incurred in bringing this motion.

DATED: October 31, 2022

Respectfully submitted,

/s/ Rose Leda Ehler

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