

Kenneth R. Davis, II, OSB No. 97113
davisk@lanepowell.com
William T. Patton, OSB No. 97364
pattonw@lanepowell.com
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, Oregon 97204-3158
Telephone: 503.778.2100
Facsimile: 503.778.2200

Timothy M. Reynolds, *Admitted Pro Hac Vice*
timothy.reynolds@hro.com
HOLME ROBERTS & OWEN LLP
1700 Lincoln Street, Suite 4100
Denver, Colorado 80203
Telephone: (303) 861-7000
Facsimile: (303) 866-0200

Attorneys for Plaintiffs Atlantic Recording Corporation, Priority Records LLC,
Capitol Records, Inc., UMG Recordings, Inc. and BMG Music

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

**ATLANTIC RECORDING
CORPORATION, a Delaware corporation;
PRIORITY RECORDS LLC, a California
limited liability company; CAPITOL
RECORDS, INC., a Delaware corporation;
UMG RECORDINGS, INC., a Delaware
corporation; and BMG MUSIC, a New York
general partnership,**

Case No. 3:05-CV-933-AS

Plaintiffs'
**OBJECTIONS TO THE MAGISTRATE
JUDGE'S FINDINGS AND
RECOMMENDATION OF
SEPTEMBER 21, 2007**

Plaintiffs,

Pursuant to Rule 72(b)

v.

TANYA ANDERSEN,

Defendant.

OBJECTIONS TO THE MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION
OF SEPTEMBER 21, 2007

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is an action for copyright infringement brought under the Copyright Act, 17 U.S.C. 101, *et seq.* On June 1, 2007, the parties submitted a stipulation of dismissal of Plaintiffs' claims with prejudice. (Doc. No. 129). Defendant then filed a motion for attorney fees under Section 505 of the Copyright Act ("Motion," Doc. No. 138), to which Plaintiffs responded on August 23, 2007 ("Response," Doc. No. 144). On September 21, 2007, Magistrate Judge Ashmanskas recommended that Defendant's Motion be granted. (Doc. No. 151.)

As demonstrated below, the Recommendation contains a number of findings and conclusions that are either contrary to applicable law or have no support in the record. The errors were both legal and factual. With respect to legal error, the Recommendation incorrectly distinguishes controlling precedent that precludes finding Defendant to be a prevailing party. Defendant is not a "prevailing party" such that she is eligible to recover attorney fees under Section 505 of the Copyright Act. To be a "prevailing party," one must obtain an adjudication on the merits or a court-ordered consent decree. Here, the parties' agreement to dismiss Plaintiffs' claims against Defendant did not result an adjudication on the merits or a court-ordered consent decree. Indeed, as the Magistrate Judge expressly recognized, at the time the parties agreed to dismiss Plaintiffs' claims, "discovery was not complete, the evidentiary record was not fully developed and the court had not reached the merits." (Doc. No. 51 at 12.) Thus, Defendant is not a prevailing party as a matter of law. In finding to the contrary, the Magistrate Judge applied the wrong legal standard.

Next, with respect to factual errors, the Recommendation fundamentally misunderstands the facts in this case. By way of example, the Magistrate Judge presumed that a third party living in Everett, Washington, Chad Alstad, could have been the infringer when, in fact, and as a technical matter, Mr. Alstad could not have been the infringer. In fact, the issue regarding Mr. Alstad is a red herring because, as explained below, technical information provided by Verizon

precludes him from being the infringer. As a result of this fundamental misunderstanding of the facts, the Magistrate Judge's analysis of the *Fogerty* factors is simply incorrect.

Proper analysis of the *Fogerty* factors, in light of the correct facts, compels the conclusion, contrary to the Magistrate Judge's findings, that: (1) Plaintiffs had more than enough evidence to support the initial filing of their claim against Defendant, (2) Plaintiffs acted reasonably in pursuing their claims against Defendant even after they discovered the existence of the third party, (3) Plaintiffs did not suppress or ignore any evidence, (4) the evidence, in fact, pointed towards Defendant as the likely infringer, and (5) the purposes of the Copyright Act would, in fact, be furthered by a denial of fees in this situation.

As demonstrated below, Plaintiffs had – and still have – substantial evidence that a file sharing program was used on a computer in Defendant's household to download and distribute Plaintiffs' copyrighted sound recordings through Defendant's Verizon Internet account. Defendant herself admitted to having a file sharing program on her computer, although she claimed she never used it. Every other court to consider the issue has determined that claims of infringement based on such evidence are neither frivolous nor objectively unreasonable.

Plaintiffs brought this lawsuit in good faith to protect their copyrights. The record shows that Plaintiffs were interested only in pursuing the direct infringer in this case, and nothing suggests that Plaintiffs brought this lawsuit for any purpose other than to protect their copyrights.

Contrary to the Magistrate Judge's finding, the record shows that Plaintiffs acted reasonably in an effort to protect their copyrights. The Magistrate Judge erroneously found that Plaintiffs did not act reasonably in pursuing their claims as discovery progressed. This finding is based on factual findings that are wrong. By way of example, the Magistrate Judge incorrectly found that an unrelated third party, Mr. Alstad, used the screen name "gotenkito@KaZaA." There is no evidence to suggest that Mr. Alstad used "gotenkito" anywhere other than his MySpace.com page, and Defendants put forth no evidence to the contrary. Additionally, the Magistrate Judge's finding that the evidence was "equally persuasive" that the third party was

the actual infringer in this case is wrong. The technical information and evidence in this case indicate that the infringement occurred in the home of a Verizon subscriber without the use of any type of wireless account. On three separate occasions, Verizon identified the subscriber as Defendant. Both the third party, Mr. Alstad, and Defendant acknowledge that they do not know each other, and there has never been anything to suggest that Mr. Alstad ever used Verizon (let alone Defendant's Verizon account), had ever been in the State of Oregon, or had any other possible connection to the infringement alleged in this case. As such, contrary to the Magistrate Judge's finding, there is no evidence linking Mr. Alstad to the infringements at issue.

Plaintiffs' evidence against Defendant, on the other hand, is substantial. This evidence includes three separate verifications by Verizon that the infringement alleged in this case occurred through Defendant's Verizon Internet account, Defendant's admission that the KaZaA-Lite file sharing program was on her computer, the possible relationship of Defendant's daughter to the "gotenkito" username at issue, and Defendant's acknowledgement that she likes many of the artists whose works were infringed. On this record, the Magistrate Judge's finding that the evidence implicating the third party "was at least as substantial" as that implicating Defendant is without any basis.

Finally, an award of fees to Defendant would not advance the considerations of compensation and deterrence that underpin the Copyright Act. To the contrary, an award of fees to Defendant in this case could have a chilling effect on other copyright holders and could deter them from pursuing similar good faith litigation to protect their legitimate copyright interests.

For all of these reasons, Plaintiffs respectfully submit that this Court should not adopt the Recommendation, and that Defendant's Motion for fees should be denied.

II. STANDARD OF REVIEW

Where a timely objection is filed to the Magistrate Judge's determination of a motion for fees, the district court reviews the motion *de novo*, because the Federal Rules of Civil Procedure require that the motion for attorney's fees be treated "under Rule 72(b) as if it were a dispositive

pretrial matter.” See Fed. R. Civ. P. 54(d)(2)(D). Determinations made by magistrate judges on dispositive pretrial motions are reviewed *de novo* by the district court. See Fed. R. Civ. P. 72(b).

In making a *de novo* determination, the district court “may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b); see also 28 U.S.C. § 636(b)(1). In reviewing a magistrate judge’s recommendations, the district court must actually review and weigh the evidence presented to the magistrate judge, and not merely rely on the magistrate judge’s report and recommendation. See *United States v. Raddatz*, 447 U.S. 667, 675 (1980); 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3070.2, at 382 (2d ed. 1997).

III. STATEMENT OF RELEVANT FACTS

The facts as set forth in Plaintiffs’ Response (Doc. No. 144 at 3-7) are supported by the record in this case, and are relevant to this Court’s consideration of Plaintiffs’ Objection to the Recommendation. For the Court’s convenience, those facts are summarized below.

Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings. Collectively, Plaintiffs face a massive problem of digital piracy over the Internet. Indeed, the United States Supreme Court has characterized the magnitude of online peer-to-peer (“P2P”) piracy as infringement “on a gigantic scale.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940 (2005). P2P users who disseminate (upload) and copy (download) copyrighted material without authorization of the copyright holder violate the Copyright Act. *Id.* at 918-924.

It is in this context that Plaintiffs brought the current copyright infringement action against Defendant. In their Complaint, Plaintiffs alleged that Defendant infringed (1) their exclusive rights to copy certain of their copyrighted sound recordings by using an online media distribution system to download the copyrighted sound recordings through the Internet to her computer hard drive; and (2) their exclusive rights to distribute such copyrighted sound

recordings by using an online media distribution system to distribute them over the Internet to the millions of others who use P2P networks. (Doc. No. 1 at ¶ 13.)

Plaintiffs had substantial evidence of infringement by Defendant when they filed their lawsuit, and, indeed, still have such evidence today. Specifically, on May 20, 2004, Plaintiffs' investigator discovered a P2P infringer using the KaZaA file-sharing program under the name "gotenkito@KaZaA." This infringer was distributing, from a KaZaA shared folder, 1,288 digital audio files—many of them Plaintiffs' copyrighted sound recordings—to millions of other KaZaA users. The infringer connected to the Internet using the Internet Protocol ("IP") address 4.41.209.23. In response to a Rule 45 subpoena served by Plaintiffs on Verizon Internet Services, Inc. ("Verizon"), Defendant's Internet Service Provider ("ISP"), Verizon identified Defendant as the individual responsible for IP address 4.41.209.23 on May 20, 2004.

After learning Defendant's identity, Plaintiffs' counsel sent Defendant a letter advising that copyright infringement had been detected through her Internet account and provided a telephone number and e-mail address that Defendant could contact to discuss this matter and possibly resolve it before the commencement of litigation. (See Doc. No. 144 at Ex. A.) After Plaintiffs did not hear anything from Defendant, Plaintiffs' settlement representatives contacted Defendant in the hope of engaging in settlement negotiations. In the course of those communications, Defendant admitted that she had the KaZaA-Lite file sharing program on her computer, but she claimed that she had never used it and denied any responsibility for the infringement. (See Excerpt from Deposition of Tanya Andersen, attached hereto as Ex. A, at p. 83, l. 20-23.) As a result of this telephone call, Plaintiffs asked Verizon to review its records and re-verify that Defendant was properly identified in response to Plaintiffs' Rule 45 subpoena. Shortly thereafter, Verizon confirmed that the proper individual had been identified and that Defendant was responsible for IP address 4.41.209.23 on May 20, 2004, at the precise time of the infringement. (See Doc. No. 144 at Ex. B.)

Having twice confirmed that the infringement occurred from a computer in Defendant's household and through an Internet account for which Defendant is responsible, and having nothing more than Defendant's general denials of responsibility, which are common in litigation of this type, Plaintiffs filed their Complaint against Defendant on June 24, 2005. (Doc. No 1.)

After Plaintiffs filed suit, they continued their investigation and, in October 2005, again asked Verizon to verify its identification of Defendant. On October 18, 2005, Verizon confirmed for a third time that Defendant was properly identified. (See Doc. No. 144 at Ex. C.) Plaintiffs also conducted an independent investigation of the username in this case—"gotenkito@KaZaA." Although Plaintiffs identified a third party, Mr. Alstad, who used the "gotenkito" username for other online purposes, Plaintiffs determined, based on information from both Mr. Alstad and Defendant, that Mr. Alstad could not have been the infringer. Mr. Alstad was adamant that he has never been to Oregon, let alone in Defendant's home connected to her IP address. (See Doc. No. 144 at Ex. F.)¹

In March 2006, at Defendant's request, Plaintiffs agreed to conduct a forensic analysis of Defendant's hard drive, and the matter was stayed pending the outcome of the inspection. (Doc. Nos. 35, 42.) The inspection, however, was inconclusive and was inconsistent with other evidence in the case, including specifically Plaintiffs' evidence from Verizon that Defendant's Internet account was used to infringe Plaintiffs' copyrights. (Doc. No. 80.) Plaintiffs provided Defendant with a report of the inspection both via letter, and via a formal submission in response to the Magistrate Judge's order. (Doc. No. 75 at Ex. 1, Doc No. 80.)

¹ Although Defendant contends otherwise, it was Plaintiffs, not Defendant, who first discovered the existence of this third party user of the "gotenkito" name. The Magistrate Judge's suggestion that Plaintiffs somehow delayed their pursuit of this individual is simply wrong. In fact, Plaintiffs attempted to contact this individual immediately upon discovering his existence, but were thwarted in their efforts to speak with him until April 2007. As set forth in detail on page 18, *infra*, when Plaintiffs first became aware of Mr. Alstad via his MySpace.com page, the only information available to them was his first name, age and geographic location. It took time and effort for Plaintiffs to discover Mr. Alstad's identity and contact information, and then to have a conversation with him regarding this matter.

In a good faith attempt to reconcile the inconsistent information that Plaintiffs had received, Plaintiffs engaged in further, targeted discovery as soon as the stay was lifted and the parties were permitted to pursue such discovery. (Doc. No. 78.) Specifically, Plaintiffs deposed Defendant and individuals identified by Defendant as having had access to her computer and Verizon Internet account during the relevant time period.

The shared folder at issue in this matter contains over one thousand sound recordings belonging to many different genres, including the country and rock genres that Defendant admitted to liking in her deposition. (See Doc. No. 144 at Ex. E, p. 25, l. 13-17.) At her deposition, Defendant admitted to being familiar with or listening to music by artists including Bryan Adams, Chris Isaak, John Cougar Mellancamp, Tom Petty, Travis Tritt, Trisha Yearwood, Everclear, Steve Miller, Alabama, Aerosmith, Phil Collins, Sting, Billy Idol, Beck, Lil Kim, Rob Zombie, Nelly and Poison, among others. (See Doc No. 144 at Ex. E, p. 117, l. 13-19, p. 118, l. 12 – p. 119, l. 3, p. 120, l. 25, p. 123, l. 13-21.) Multiple sound recordings by each of the above-listed artists appear in the shared folder at issue in this case. (See Doc. No. 1 at Ex. B.)

As noted above, “gotenkito” is associated with a character from the anime series known as Dragonball Z. In her deposition, Lindsay Andersen, the half-sister of Defendant’s daughter Kylee Andersen, testified that Kylee is a fan of Dragonball Z and that she “talks about it a lot” and “really likes it.” (See Doc. No. 144, Ex. G at p. 46, l. 10 – p. 47, l. , 12.) It is impossible to ignore the possible link between Defendant’s daughter and the “gotenkito” username on the KaZaA shared folder distributing sound recordings through Defendant’s Internet account. It would be an extraordinary coincidence indeed if this Defendant had nothing to do with the infringement at issue in this matter.

Finally, Defendant again admitted that the KaZaA-Lite software was on her computer, but she claimed that her friend, Ania Bruns, had installed that software. (See Ex. A, at p. 83, l. 20-23.) At her deposition, however, Ania Bruns flatly denied having installed Kazaa-Lite on

Defendant's computer. (*See* Doc. No. 144 at Ex. H, p. 32, l. 14 – p. 33, l. 19.) In fact, Ms. Bruns denied ever having installed KaZaA-Lite on any computer. (*See id.* at p. 33, l. 17-19.)

In sum, after limited but reasonable discovery, Plaintiffs were unable to reconcile the inconsistent evidence in this case. On the one hand, Plaintiffs detected infringement through a computer attached to Defendant's Internet account in her home. Verizon identified the account as belonging to Defendant and then re-confirmed its identification of Defendant on two separate occasions. Many of the recordings in the shared folder are consistent with Defendant's musical taste. There is a connection between the user name at issue, "gotenkito," and Defendant's daughter who, according to at least one witness, is a fan of the Dragonball Z anime series from which the name derives.² On the other hand, the computer inspection was inconsistent and inconclusive insofar as digital evidence of the infringing sound recordings could not be found, and the depositions did not help resolve these inconsistencies. In light of the foregoing, Plaintiffs agreed, in good faith, to dismiss their claims against Defendant with prejudice, and Defendant sought fees.

IV. ARGUMENT

A. **Defendant Is Not A Prevailing Party And Is Not Entitled To Attorney Fees Under The Copyright Act As A Matter Of Law.**

1. **In Ruling On The "Prevailing Party" Question, The Magistrate Judge Applied The Wrong Legal Standard.**

As set forth in Plaintiffs' Response to Defendant's Motion (Doc. No. 144 at 7-9), the threshold issue in determining whether a party is entitled to fees is determining whether that party is a "prevailing party." *See* 17 U.S.C. § 505 ("[T]he court may also award a reasonable attorney's fee to the *prevailing party*") (emphasis added). As the United States Supreme Court held in *Buckhannon Bd. & Care Home, Inc., v. West Va. Dept. of Health and Human Servs.*, 532 U.S. 598, 606 (2001), a prevailing party can only be one who secured a "judgment on

² At a later deposition, Defendant's daughter testified that she was not a fan of the Dragonball Z cartoon. (*See* Excerpt from Deposition of Kylee Andersen, attached as Ex. B, at p. 21, l. 19-20.)

the merits . . . or obtained a court-ordered consent decree.” The Magistrate Judge, however, declined to apply this prevailing party test. Plaintiffs respectfully submit that this was error.

Buckhannon concerned the fee-shifting provisions of both the Fair Housing Administration Act (“FHAA”) and the Americans with Disabilities Act (“ADA”), both of which allow an award of fees to the “prevailing” party. 532 U.S. at 601. After considering a number of theories, the Court held that, to be a “prevailing party” under these statutory provisions, a party must secure a “judgment on the merits . . . or obtain[] a court-ordered consent decree.” *Buckhannon*, 532 U.S. at 606. In reaching this decision, the Supreme Court made it clear that the term “prevailing party” should be interpreted consistently across federal statutes that authorize fees to a prevailing party. *Buckhannon*, 532 U.S. at 602-603, n.4.

Many courts, including the Ninth Circuit Court of Appeals, have since applied *Buckhannon* to determine prevailing party status under a variety of federal fee-shifting statutes. See *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 898 (9th Cir. 2004) (determining prevailing party status under the Individuals with Disabilities Education Act); *Kasza v. Whitman*, 325 F.3d 1178, 1180 (9th Cir. 2003) (Resource Conservation and Recovery Act); *Perez-Arellano v. Smith*, 279 F.3d 791, 793-94 (9th Cir. 2002) (Equal Access to Justice Act); *Gautreaux v. Chi. Hous. Auth.*, 491 F.3d 649, 659 (7th Cir. 2007); *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 454 (4th Cir. 2004); *Roberson v. Giuliani*, 346 F.3d 75, 79 (2d Cir. 2003); *Heeren v. City of Jamestown*, 39 F.3d 628, 631 (6th Cir. 1994).

The district courts in this Circuit, along with those in several other circuits, have also applied *Buckhannon*’s holding to determine prevailing party status under Section 505 of the Copyright Act – the same fee-shifting provision at issue here. See *Berry v. Hawaiian Express Serv.*, 2007 U.S. Dist. LEXIS 15077, at *60-64 (D. Haw. Mar. 2, 2007) (compiling cases from six other jurisdictions applying *Buckhannon* to fee disputes arising under the Copyright Act); *Shloss v. Sweeney*, 2007 U.S. Dist. LEXIS 41847, at *7 (N.D. Cal. May 30, 2007) (relying on *Buckhannon* in holding that a prevailing party in the context of the Copyright Act “must

(1) achieve a material alteration of the legal relationship of the parties (2) which is judicially sanctioned.”). Based on the foregoing case law, and in particular the Supreme Court’s admonition to interpret the term “prevailing party” consistently across federal statutes, *Buckhannon*, 532 U.S. at 602-603, n.4, Plaintiffs respectfully submit that the Magistrate Judge erred by not applying the *Buckhannon* standard in this case.

2. Application Of The Correct Legal Standard Demonstrates That Defendant Is Not A Prevailing Party In This Case.

Application of *Buckhannon* demonstrates that Defendant is not a prevailing party in this case. Plaintiffs’ claims in this case were not dismissed upon the basis of any relief ordered by the Court. Rather, Plaintiffs’ claims were dismissed by joint stipulation of the parties. (Doc. No. 129.) Therefore, no relief was provided to Defendant by the Court, and she cannot be a prevailing party. *See Buckhannon*, 532 U.S. at 606; *see also Priority Records LLC v. Chan*, 2005 U.S. Dist. LEXIS 20360 (E.D. Mich. May 19, 2005) (declining to award fees to a defendant following dismissal of the plaintiffs’ claims with prejudice) (Doc. No. 144, Ex. K).

Shloss v. Sweeney is substantially on point. In *Shloss*, the court held that “[d]efendants’ contention that they are the ‘prevailing party’ because Plaintiff agreed to dismiss . . . claims with prejudice is untenable.” *Shloss* recognized the slippery slope that would be created by a contrary finding. *Id.* at *7-8. Specifically, a finding of prevailing party status in such circumstances would “mean that any party who secures a dismissal with prejudice of the claims against them . . . is actually a prevailing party (and potentially entitled to an award of attorney fees.)” *Id.* at *7-8. The court in *Shloss*, in an effort to avoid a slippery slope, refused to adopt such a rule.

Here, for the same reasons, Defendant cannot be said to be a prevailing party. Plaintiffs’ claims were dismissed by agreement of the parties resulting from a good faith overture on the part of Plaintiffs. On these facts, there was no judgment on the merits or court-ordered decree. As such, Defendant was not a prevailing party under the Copyright Act and is not entitled to fees under Section 505. *See Buckhannon*, 532 U.S. at 606.

The Magistrate Judge's refusal to follow *Shloss* in the present circumstances was erroneous. The Magistrate Judge declined to follow *Shloss* on the ground that Defendant here made no concessions in exchange for Plaintiffs' stipulation to dismiss their claims with prejudice. (*See id.*) In *Shloss*, the court had awarded fees to the plaintiff where both parties sought an award of fees after entering into a stipulation that incorporated a settlement agreement whereby the defendant acquiesced to the plaintiffs' demands in exchange for dismissal with prejudice. *Shloss*, 2007 U.S. Dist. LEXIS 41847, at *8-9. Contrary to the Magistrate Judge's interpretation of *Shloss* in this case, the court did not deny the defendant's request for fees, because the defendant had made concessions whereas the plaintiff had made none. Rather, the court denied the defendant's fee request for the same reasons the Plaintiffs argue here, and because the settlement agreement memorializing the plaintiff's rights was judicially sanctioned and therefore met the requirements of *Buckhannon*. *See Shloss*, 2007 U.S. Dist. LEXIS 41847, at *8-9. Here, as in *Buckhannon*, there has been no judgment on the merits or court-ordered decree. Accordingly, Plaintiffs respectfully submit that the Magistrate Judge's refusal to follow *Shloss* was in error.

For all of these reasons, Plaintiffs submit that Defendant is not a prevailing party and is not entitled to fees as a matter of law. The Magistrate Judge's finding to the contrary is based on an incorrect legal standard and should be rejected.

B. Defendant Is Also Not Entitled To Fees Under The Factors Identified By The Supreme Court In *Fogerty*, And The Magistrate Judge's Finding To The Contrary Is Based On Fundamental Misconceptions Concerning The Record In This Case.

Although Plaintiffs maintain that the Magistrate Judge erred in finding that Defendant is a prevailing party, should the Court accept the Magistrate Judge's recommendation regarding the prevailing party question, Plaintiffs submit that the Magistrate Judge also erred in finding that Defendant should be entitled to fees under the *Fogerty* factors.

In *Fogerty*, the Supreme Court outlined four non-exclusive factors to guide district courts in determining whether to award attorney fees: (1) frivolousness, (2) the parties' motivation, (3) objective unreasonableness, and (4) the need in particular circumstances to advance considerations of compensation and deterrence. *Fogerty*, 510 U.S. at 534 n. 19; *see also Smith v. Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996) (applying the *Fogerty* factors and denying attorney fees to a prevailing party). However, "there is no precise rule or formula for [determining whether a fee award is appropriate], and equitable discretion should be exercised 'in light of the considerations we have identified.'" *Fogerty*, 510 U.S. at 534. The overriding consideration is whether such an award would further the purposes of the Copyright Act. *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 626 (6th Cir. 2004).

Applying the *Fogerty* framework here, Defendant's request for fees should be denied because (1) Plaintiffs' claims were well grounded in law and in fact; (2) Plaintiffs acted reasonably both before and after filing their lawsuit; (3) Plaintiffs brought and pursued this lawsuit to protect their copyrights; and (4) there is no reason to deter Plaintiffs' good faith efforts to protect their valid copyrights, and an award of fees to Defendant would not further the purposes of the Copyright Act. Accordingly, this Court should not accept the Magistrate Judge's Recommendation and should deny Defendant's request for an award of fees under Section 505 of the Copyright Act.

1. Plaintiffs' Lawsuit Was Well Grounded and In Fact and Law.

A claim is frivolous only if it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). As shown in Plaintiffs' Response to Defendant's Motion (Doc. No. 144 at 10-13), and further in this submission, Plaintiffs demonstrated that their lawsuit was neither frivolous nor objectively unreasonable.

Plaintiffs discovered substantial copyright infringement that was traced directly to an Internet account for which Defendant was responsible. These facts, by themselves, provided more than ample basis for the allegations in Plaintiffs' Complaint against Defendant, and

multiple federal courts have so held in other cases brought by record companies that are factually and legally similar to the present case. *See, e.g., Atlantic Recording Corp. v. Heslep*, No. 4:06-cv-132-Y, slip op. at 11 (N.D. Tex. May 16, 2007) (finding that, despite Defendant's sworn denial of responsibility, information indicating that the IP address used to access the internet was traced to an ISP account controlled by the defendant was sufficient evidentiary support for plaintiffs' claim of copyright infringement) (attached to Doc. No. 144 as Ex. L); *Virgin Records Am., Inc. v. Thompson*, No. SA-06-CA-592-OG, slip op. at 2 (W.D. Tex. Nov. 30, 2006) (holding that the plaintiffs' lawsuit was neither frivolous nor prosecuted with malevolent intent because the plaintiffs had discovered "substantial copyright infringement of their songs by a file-sharing program attached to an internet account registered to [defendant]") (attached to Doc. No. 144 as Ex. J); *Virgin Records Am., Inc. v. Darwin*, 2006 U.S. Dist. LEXIS 96069, at *9 (C.D. Cal. Apr. 17, 2006) ("[I]t was not frivolous for plaintiffs to initiate a lawsuit against defendant, whom Cox identified.") (attached to Doc. No. 144 as Ex. N); *Capitol Records, Inc. v. O'Leary*, 2006 U.S. Dist. LEXIS 5115, at *4 (C.D. Cal. 2006) (holding that "Plaintiffs were reasonable in bringing an action against [defendant] because the Internet account used to commit the alleged infringement was registered in her name only.") (attached to Doc. No. 144 as Ex. O); *Chan*, 2005 WL 2277107, at *2 (holding that plaintiffs' lawsuit against "the registered user for the IP address from which the allegedly improper downloading and file sharing occurred" was proper).

The Magistrate Judge's finding that "it can reasonably be inferred that plaintiffs did not possess . . . *prima facie* evidence" to support their claims (Doc. No. 151 at 8) is utterly without any basis and should be rejected. The Magistrate Judge's finding appears to be based solely on Plaintiffs' decision to agree to a dismissal of their claims rather than to prepare a response to Defendant's motion for summary judgment and pursue the case to trial. (*Id.*) Plaintiffs' decision to dismiss their claims, however, was the result of the evidentiary inconsistency concerning the computer inspection noted above and in no way can be read to suggest that Plaintiffs lacked a *prima facie* case against Defendant. On the contrary, Plaintiffs' decision was based on all of the

PAGE 13 - OBJECTIONS TO THE MAGISTRATE JUDGE'S FINDINGS AND
RECOMMENDATION OF SEPTEMBER 21, 2007

facts gathered in the case and was a reasonable exercise of discretion despite the evidence against Defendant – evidence which still persists today. As stated above, among other evidence, Verizon confirmed on three separate occasions that the infringement alleged in this case occurred through Defendant’s Verizon Internet account, Defendant admitted that the KaZaA-Lite file sharing program was on her computer, Defendant acknowledged liking many of the artists whose works were infringed, and Plaintiffs identified a connection between Defendant’s daughter and the username at issue. Plaintiffs submit that this evidence easily establishes a *prima facie* case against Defendant, and the Magistrate Judge’s inference to the contrary should be rejected.

2. Plaintiffs’ Pursuit Of This Lawsuit Was Objectively Reasonable.

In the Recommendation, the Magistrate Judge did not find that Plaintiffs’ claims were frivolous or objectively unreasonable when filed. Rather, the Magistrate Judge found that Plaintiffs’ pursuit of their claims became objectively unreasonable as the case progressed. (Doc. No. 151 at 7, 10.) Plaintiffs respectfully submit that this finding is based on several fundamental misconceptions regarding the law and facts of this case, and should be rejected.

First, the “reasonableness” of a plaintiff’s position is to be determined as of the time the litigation is initiated, and not retroactively. *See Garnier v. Andin Int’l, Inc.*, 884 F. Supp. 58, 62 (D.R.I. 1995) (reasoning that a party should not be faulted for “launching a very reasonable suit to protect is copyright[s]”); *see also Eagle Servs. Corp. v. H2O Indus. Servs.*, 2007 U.S. Dist. LEXIS 25561, *39 (N.D. Ind. Mar. 29, 2007) (declining to “judge the reasonableness of the Plaintiff’s case through the narrow lens of hindsight.”) Accordingly, Plaintiffs submit that the Magistrate Judge’s finding that Plaintiffs’ pursuit of their claims became objectively unreasonable is not supported by applicable law and should be rejected.

Second, the Magistrate Judge’s findings (Doc. No. 151 at 9) that a third party, Mr. Alstad, could have been the infringer is incorrect. First, based on the technical information available, it is not possible for Mr. Alstad to have been the infringer. All information indicates that the infringement occurred in Defendant’s home, and it is undisputed that Mr. Alstad has

never been in the State of Oregon, let alone Defendant's home. Furthermore, the record shows that Mr. Alstad used the "gotenkito" username for a MySpace page only, *not* for KaZaA. Indeed, neither party has ever asserted or put forth any evidence to suggest that this individual ever used the "gotenkito@KaZaA" user name, which is the KaZaA user name associated with the shared folder at issue in this case. (Doc. No. 144 at 5-6; Doc. No. 139 at 6.)

Third, there is no basis in the record for the Magistrate Judge's finding that the evidence implicating the third party "was at least as substantial" as that implicating Defendant. (Doc. No. 151 at 10-11.) With respect to the evidence implicating Defendant, the infringement in this case was tied directly to a computer in Defendant's home and occurred through Defendant's Internet account with Verizon. Verizon confirmed its identification of Defendant on three separate occasions, and Defendant even admitted that KaZaA-Lite, an unauthorized file-sharing program, had been installed on her computer. Defendant also admitted that she enjoyed listening to many of the artists whose works were infringed. By contrast, the only evidence indicating any connection between Mr. Alstad and the infringement in this case was a username, which he used in connection with a MySpace.com page and not, as the Magistrate Judge found, in connection with any file-sharing program, including KaZaA. There has never been *any* evidence that this third party has ever been to Oregon, ever had a Verizon account, or ever accessed Defendant's Internet account. (Doc. No. 144, Ex. A at ¶ 8.)

Fourth, the Magistrate Judge faulted Plaintiffs, incorrectly, for not contacting Mr. Alstad until April 2007. (Doc. No. 151 at 9-12.) This finding is apparently based on the incorrect assumption that Plaintiffs knew Mr. Alstad's name and contact information from the time they first identified him, which is not the case. Rather, what Plaintiffs initially found was only a MySpace account and web page with the username "gotenkito." The only identifying information available at the time was Mr. Alstad's first name, age and geographic location. Eventually, Plaintiffs were able to locate Mr. Alstad at a company referenced on his MySpace.com page. Then, after months of unreturned phone calls to this company and

PAGE 15 - OBJECTIONS TO THE MAGISTRATE JUDGE'S FINDINGS AND
RECOMMENDATION OF SEPTEMBER 21, 2007

unreturned e-mails to his MySpace.com page, Plaintiffs finally spoke with Mr. Alstad in April 2007. (See Doc. No. 144, Ex. F at ¶ 5.) Therefore, contrary the Magistrate Judge's finding, Plaintiffs were not dilatory in attempting to identify, locate and contact this third party, but rather they acted expeditiously and reasonably, with no help whatsoever from Defendant.

Based on the forgoing, Plaintiffs' respectfully submit that they had an objectively reasonable basis to continue investigating their claims against Defendant, and that the Magistrate Judge's findings to the contrary are not supported by the record and should be rejected.

3. Plaintiffs' Motivation For Filing And Pursuing This Lawsuit Was Proper.

As set forth in Plaintiffs' Response to Defendant's Motion (Doc. No. 144 at 13-14), Plaintiffs brought this action in an effort to protect their copyrights. See *Heslep*, No. 4:06-cv-132-Y, slip op. at 11 (holding that Plaintiffs "brought this lawsuit not for the purposes of harassment or to extort [money from the defendant] . . . , but, rather, to protect their . . . copyrights from infringement and to help . . . deter future infringement"). Indeed, it is not disputed that substantial copyright infringement occurred here.

As stated previously, the United States Supreme Court has characterized online piracy through P2P networks as copyright infringement "on a gigantic scale." See *Grokster*, 545 U.S. at 940; see also *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (noting that an illegally downloaded sound recording "is a direct substitute for a purchased copy"). Filing infringement claims for which there is a reasonable basis in law and fact in an effort to deter online piracy is hardly illustrative of improper motivation. See *Heslep*, No. 4:06-cv-132-Y, slip op. at 11 (stating that "Plaintiffs face a formidable task in trying to police the internet in an effort to reduce or put a stop to the online piracy of their copyrights").

The record here shows that Plaintiffs were interested only in pursuing the direct infringer in this case, and there is nothing to suggest that Plaintiffs brought or continued this lawsuit for any purpose other than to protect their copyrights. Although the Magistrate Judge nowhere found that Plaintiffs had an improper motive in filing and pursuing this case, he did find that

Plaintiffs “rejected or sought to suppress evidence to the extent it tended to exonerate defendant.” (Doc. No. 151 at 11.) This finding has absolutely no support in the record. Plaintiffs never “rejected” any evidence that tended to exonerate Defendant. On the contrary, Plaintiffs investigated all of the evidence, including Defendant’s denials of responsibility, but Plaintiffs were never able to reconcile the conflict between Defendant’s denials and the compelling evidence that otherwise indicated that the infringement was committed on a computer in Defendant’s home. Plaintiffs provided Defendant with the results of their inspection of Defendant’s computer soon after it was completed and, further, provided her with a formal declaration regarding the inspection. (Doc. No. 75 at Ex. 1; Doc. No. 80.) In short, Plaintiffs neither suppressed nor rejected any evidence in this case.

4. There Is No Reason To Deter Plaintiffs’ Good Faith Efforts To Protect Their Valid Copyrights, And An Award Of Fees To Defendant Would Not Further The Purposes Of The Copyright Act.

As set forth in Plaintiffs’ Response to Defendant’s Motion (Doc. No. 144 at 14-15), the “principal purpose of the [Copyright Act] is to encourage the origination of creative works by attaching enforceable property rights to them.” *Diamond v. Am-Law Publ’g Corp.*, 745 F.2d 142, 147 (2d Cir. 1984). The imposition of a fee award against a copyright holder with an objectively reasonable claim will not promote the purposes of the Copyright Act. *See Mitek Holdings, Inc.*, 198 F.3d at 842-43 (reversing award of fees to defendant and holding that “[t]he touchstone of attorney’s fees under § 505 is whether imposition of attorney’s fees will further the interests of the Copyright Act, i.e., by encouraging the raising of objectively reasonable claims and defenses”) (quoting *Fogerty*, 510 U.S. at 526-27).

The Magistrate Judge found that Plaintiffs’ conduct should be deterred by an award of fees to Defendant based in part on the finding that Plaintiffs ultimately dismissed their claims after they “exerted a significant amount of control over the course of discovery, repeatedly and successfully seeking the [C]ourt’s assistance through an unusually extended and contentious period of discovery disputes.” (Doc. No. 151 at 13.) This finding is contradicted by the record.

First, discovery was neither unusually extended nor made contentious by Plaintiffs. On the contrary, discovery in this matter was stayed for over ten months pursuant to the Magistrate Judge's orders (Doc. Nos. 35, 42), pending the outcome of an inspection of Defendant's computer hard drive that Defendant initially requested (Doc. No. 139 at 5-6). That inspection was delayed by various objections raised by Defendant (Doc. Nos. 41, 47, 55), which objections the Magistrate Judge ultimately rejected (Doc. Nos. 50, 58). When Plaintiffs sought discovery, specifically Defendant's deposition, it was Defendant who exerted control over the process by refusing to cooperate until compelled to do so. (*See* Doc. Nos. 66, 67, 84, 85, 86, 92.) By contrast, Plaintiffs responded in a timely and thorough manner to Defendant's discovery requests – a fact that is supported by the Magistrate Judge's denial of both Defendant's motion for sanctions (Doc. No. 71) and her motion to compel (Doc. No. 96). (Doc. Nos. 78, 113.)

Second, as the record in this case shows, Plaintiffs exerted no control over the discovery process, which was stayed to accommodate Defendant's requests and which was contentious only as a result of Defendant's ongoing objections and unwillingness to cooperate as set forth above. The Magistrate Judge's finding that Plaintiffs' conduct with regard to discovery is properly deterred is not supported by the record and should be rejected.

As a matter of policy, when a plaintiff determines that evidence that becomes available through discovery is inconsistent with their theory of the case, dismissing claims should be encouraged rather than discouraged. If the Magistrate Judge's Recommendation is adopted by this Court, Plaintiffs, and other copyright holders with objectively reasonable claims, will be encouraged to proceed with litigation rather than dismiss claims under circumstances such as those present in this case. Given Plaintiffs' diligent pursuit of their claims in compliance with the Magistrate Judge's orders and the substantial body of evidence that still indicates that the infringement at issue occurred on a computer in Defendant's home, Plaintiffs maintain that an award of fees in the interest of deterrence is neither necessary nor warranted.

Lastly, as shown in the record, Defendant unnecessarily expanded and prolonged this matter on several occasions. First, Defendant insisted on pursuing, not once, but twice, nine baseless counterclaims against Plaintiffs (Doc. Nos. 7, 12), in response to which Plaintiffs spent substantial resources seeking dismissal (Doc. Nos. 18, 21, 94, 95, 114 and 115), only to have Defendant seek voluntary dismissal of her counterclaims without prejudice (Doc. Nos. 136 and 137) so that she could reassert them in another matter and thereby force Plaintiffs to defend against them yet again. Second, after initially requesting that Plaintiffs inspect her computer, Defendant unnecessarily fought Plaintiffs' request for production and Plaintiffs' proposed protective order, which required Plaintiffs to file two motions to compel (Doc. Nos. 36 and 43) and which ultimately resulted in production of Defendant's computer subject to the protective order proposed by Plaintiffs. (Doc. Nos. 42 and 50.) Finally, rather than cooperating with Plaintiffs in their effort to take her deposition, Defendant opposed her deposition vigorously and did not cooperate until ordered to do so by this Court (Doc No. 92), in response to Plaintiffs' second motion to compel (*See* Doc. No. 66 and 84). Even then, Defendant expended more time and money seeking to limit her deposition. (Doc. No. 100.)

Despite these facts, the Magistrate Judge somehow found reason to compensate Defendant, stating that, even though her defense "did not help to clarify the contours of copyright law, her participation was involuntary." (Doc. No. 151 at 14.) Plaintiffs respectfully submit that a defendant's participation in a lawsuit is, by definition, involuntary, and that no case supports an award of fees under the Copyright Act under such circumstances.

Ultimately, Plaintiffs' claims against Defendant were dismissed pursuant to a stipulation agreed to by the parties. There was (and still is) substantial evidence implicating Defendant in the infringement at issue. Plaintiffs chose to dismiss their claims in a reasonable exercise of litigation discretion in light of inconsistencies yielded by a computer inspection, and for no other reason. In these unusual circumstances, there is no need to deter Plaintiffs' conduct. Nor is there

any basis for compensating Defendant for conduct that intentionally and unnecessarily prolonged these proceedings.

IV. CONCLUSION

For the reasons set forth above, the Magistrate Judge's Recommendation should be rejected and the Defendant's Motion for fees under Section 505 should be denied.

DATED: October 9, 2007

LANE POWELL PC

By /s/ William T. Patton

Kenneth R. Davis, II, OSB No. 97113

William T. Patton, OSB No. 97364

Telephone: 503.778.2100

Timothy M. Reynolds, *Admitted Pro Hac Vice*
HOLME ROBERTS & OWEN LLP
1700 Lincoln Street, Suite 4100
Denver, Colorado 80203
Telephone: (303) 861-7000
Facsimile: (303) 866-0200

Attorneys for Plaintiffs Atlantic Recording Corporation, Priority Records LLC, Capitol Records, Inc., UMG Recordings, Inc., and BMG Music