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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

INTERSCOPE RECORDS, a California
general partnership; CAPITAL
RECORDS, INC., a Delaware
corporation; SONY BMG MUSIC
ENTERTAINMENT, a Delaware general
partnership; ATLANTIC RECORDING
CORPORATION, a Delaware
corporation; BMG MUSIC, a New York
general partnership; VIRGIN RECORDS
OF AMERICA, INC., a California
corporation,

Plaintiff,

v.

DAWNELL LEADBETTER and
DONALD LEADBETTER

Defendants.

NO. CV05-1149 MJP (RSL)

**THE ELECTRONIC FRONTIER
FOUNDATION'S *AMICUS CURIAE*
BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR AN
AWARD OF ATTORNEY'S FEES
AND COSTS (DKT. # 86)**

NOTE ON MOTION CALENDAR:
July 13, 2007

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1 **I. STATEMENT OF INTEREST**

2 The Electronic Frontier Foundation (“EFF”) is a member-supported, nonprofit
3 public interest organization dedicated to protecting civil liberties and free expression in
4 the digital world. Founded in 1990, EFF represents over 12,500 contributing members.
5 Part of EFF’s mission has been protecting the public from the abuse of copyright laws by
6 overreaching copyright owners. As such, EFF has opposed the Recording Industry
7 Association of America (“RIAA”) in its broad dragnet of lawsuits against small-scale
8 individual file sharers that sweeps up the guilty and the innocent alike. EFF’s interest in
9 this case is ensuring that the court is adequately briefed on the facts related to the RIAA’s
10 mass litigation program and its effects on innocent people ensnared within its nets before
11 ruling on whether Dawnell Leadbetter is entitled to attorneys’ fees.

12 **II. INTRODUCTION**

13 Since 2003, the Recording Industry Association of America (“RIAA”) and its
14 member companies (including Plaintiffs Interscope Records, Capitol Records Inc., Sony
15 BMG Music Entertainment, Atlantic Recording Corporation, BMG Music, and Virgin
16 Records of America, Inc.) have sued over 20,000 individuals, including Defendant
17 Dawnell Leadbetter, for alleged violations of copyright law associated with the use of
18 so-called “peer-to-peer file-sharing” technologies. This campaign, however, has not
19 come without costs to both individual innocent defendants and the fair administration of
20 justice. In targeting such a large group of defendants, the RIAA has repeated entangled
21 innocent internet users in its litigation dragnet by using questionable investigatory tactics,
22 untested and unsupported legal theories, and a steadfast refusal to dismiss clearly
23 erroneous claims when it has no evidence to support them.

24 Unlike many of the innocent who could not afford to do so, Defendant Leadbetter
25 chose to fight back, exposing Plaintiffs’ shoddy tactics and lack of evidence for what they
26 were – nothing more than a sham excuse to pressure her into a settlement for legal
27 violations she did not commit. Having prevailed, she now asks this Court to grant her
28 attorneys’ fees and costs. Amicus Electronic Frontier Foundation (“EFF”) files this brief

1 in support of that Application for two reasons.

2 First, attorneys' fees in this case would help balance the overall equities in the
3 RIAA's nationwide campaign. Because the RIAA can spread its litigation costs broadly
4 over thousands of lawsuits while individual defendants must bear the entire cost of each
5 one themselves, those innocent individuals mistakenly caught by the RIAA's campaign
6 are rarely able to clear their names without great expense. Upon targeting an individual,
7 the RIAA typically offers that individual the opportunity to settle the case for between
8 \$3,000 and \$5,000. This amount, usually significantly below the cost of defending the
9 suit, acts as a perverse incentive for innocent defendants, encouraging them to settle
10 rather than fight the erroneous claims against them. These proposed settlement payments
11 are a very significant amount for many of the individuals involved. By granting
12 attorneys' fees and costs to defendants such as Leadbetter, this Court would help
13 reconcile these imbalances and preserve the fair administration of justice not only in this
14 matter, but also in similar matters across the RIAA litigation spectrum.

15 Second, in bringing these erroneous suits, the RIAA is attempting to expand the
16 scope of copyright protections beyond what the law provides. The plaintiffs' flawed
17 theories of secondary liability, which they know are wrong, attempt to put innocent
18 internet account holders on the hook for third-party computer activities, even when
19 defendants have no knowledge of wrongdoing or supervisory power over infringers. As
20 one court already found, such theories are "untested and marginal" at best, and are wholly
21 unsupported by any precedent in copyright law. Capitol Records, Inc. v. Foster, No. Civ.
22 04-1569-W, 2007 U.S. Dist. LEXIS 29131, at *11 (W.D. Okla. Feb. 6, 2007). In
23 situations such as these, it is doubly important for courts to grants fees to defendants who,
24 as here, fight back in the interests of promoting the Copyright Act's true purpose and
25 proper boundaries. If individuals such as Leadbetter do not receive their fees, future
26 innocent litigants will not take up this fight and the public will suffer under the
27 misperception that such misguided theories are, in fact, the law. This would allow the
28 RIAA to expand the scope of copyright beyond what is provided by law, effectively

1 taking public rights and making these rights their own. Attorneys' fees to Defendant here
2 will defend the public's legal rights and further the proper administration of the law.

3 **III. BACKGROUND**

4 **A. The RIAA Campaign Against Individuals**

5 Four years ago, the RIAA began a campaign of mass-produced lawsuits against
6 consumers and music fans accused of sharing files on peer-to-peer (P2P) networks. It
7 filed its first round of lawsuits in 2003, suing 261 individuals. Since then, it has only
8 ramped up its efforts, suing as many as 1,100 people per month. *See* RIAA Targets New
9 Piracy Epidemic On Special High-Speed Campus Network, RIAA Press Release, (Apr.
10 12, 2005), <<http://www.RIAA.com/news/newsletter/041205.asp>>; *see also* 725
11 Additional Illegal File Sharers Cited In New Wave of Copyright Infringement Lawsuits,
12 RIAA Press Release, (Apr. 27, 2005),
13 <<http://www.RIAA.com/news/newsletter/042705.asp>>.

14 In order to identify alleged infringers, the RIAA has employed tactics of
15 questionable accuracy. Specifically, in order to identify a potential defendant for a P2P
16 lawsuit, RIAA investigators log onto P2P networks and search for allegedly infringing
17 files. When they find these files, they are able to use the networks to identify a
18 "screenname" which allegedly corresponds to the user who is responsible for hosting the
19 files. *See* Levi Pulkkinen, Downloaders Face the Music as Record Industry Sues, Seattle
20 Post-Intelligencer, (May 13, 2007),
21 <http://seattlepi.nwsourc.com/local/315599_music14.html?source=mypi>. The
22 connection between a screenname and an actual identifiable human being, however, is far
23 from certain. Because there are millions of users on P2P networks at any given moment
24 and because users often employ anonymous nicknames for such purposes, a screenname
25 itself does not give much information about a user. Additionally, some systems allow
26 different users to share the same screenname, adding to the confusion. Thus, almost
27 nothing from the P2P realm can accurately tie a virtual user directly to a real-world
28 person.

1 To combat this information gap, the RIAA typically then attempts to identify users
2 by examining the Internet Protocol (IP) address that corresponds to the internet location
3 of the allegedly infringing file. Internet Service Providers (ISPs) typically assign these
4 addresses to various users as they log on and off the network. The RIAA issues
5 subpoenas to these ISPs requesting the name of the account holder (but notably not the
6 user) whose account corresponds to the particular IP addresses hosting the allegedly
7 infringing file at the time it was discovered. *See id.*; *see also* Ray Beckerman, How the
8 RIAA Litigation Process Works, (June 22, 2007),
9 <<http://info.RIAAlawsuits.us/howRIAA.htm>>. However, for the numerous reasons listed
10 below, this method of identification is often inaccurate and error-prone.

11 **B. IP Addresses are Often Inadequate Identifiers of Alleged Infringers**

12 IP addresses are, at their core, identifiers of a particular location on a network.
13 They are *not* identifiers of a particular computer user or even a particular computer. Thus,
14 while an IP address can be an identifier in the same way that a telephone number or a
15 street address is an identifier, an IP address can also differ from those real-world
16 identifiers in significant ways. Additionally, some of the shortcomings of telephone
17 numbers and street addresses as identifiers are also present in IP addresses.

18 An ISP assigns an IP address to an internet access point on its network so that
19 other computers on a network can locate it and send information to and from it.
20 However, unlike street addresses and most phone numbers, IP addresses can be
21 “dynamic,” meaning that each time a different computer accesses the internet it may
22 receive a different IP address from the one it previously used. This would be similar to
23 the telephone company assigning you a new phone number every time you picked up the
24 phone to make a new call. Because the rate and variability of IP address assignment
25 differs widely from ISP to ISP and sometimes from day to day or week to week within the
26 same ISP, the chances of predicting which computer is using which IP at any given
27 moment is extremely difficult.

28 Second, even if one can isolate the exact IP address a given internet account is

1 using at a specific moment in time, there is no guarantee that one can determine what
2 computer is using that access point at that moment. For example, many coffee shops,
3 libraries, and airports offer “wireless” or “WIFI” access to the Internet for their customers
4 and patrons. Yet, when these users log into the Internet, the ISPs that provide access for
5 these facilities often only see a single, or at most a handful, of IP address requests. This
6 is accomplished by the use of a “router” in order to share the dedicated IP address among
7 multiple computers. This router acts like a mailroom in a large building. Messages are
8 sent to the same physical address, e.g. 1600 Pennsylvania Avenue NW, Washington, DC
9 20500, and then the mailroom (or router) sorts these messages and directs them to the
10 correct person, e.g. President Bush, Vice President Cheney, Press Secretary Tony Snow,
11 or White House Curator Bill Allman. From the outside, it appears that everyone inside
12 shares the same address. However, knowing the address from which a message
13 originated does not say which person in the company, or computer in the house, sent that
14 message.

15 Finally, even when IP addresses are able to identify a computer with certainty,
16 there is no way for the RIAA to know which physical person was actually using the
17 computer at the time of the infringement. While an ISP is able to tell the RIAA the name
18 and billing address associated with an IP address, this information alone may not be
19 enough to identify the actual infringer. Homes, businesses, and schools often allow
20 multiple people to use multiple computers at any given time. Because many computers
21 do not require passwords, there is often no way to know who is using a specific computer
22 at a specific time. To apply the mailroom analogy again, one could receive a letter from
23 the White House Press Office listed at the address of the White House postmarked on
24 May 1, 2007 at 3:00 p.m. and still not know the name of the staff member who sent the
25 letter. The same is true for IP addresses. The RIAA may discover the IP address of an
26 alleged infringer and subpoena the name of the account holder assigned that address at
27 the time, but there is no guarantee or certainty that the person named had any
28 involvement or knowledge of the computer activity at issue. Thus, the use of IP

1 addresses, while bearing the potential to produce accurate results, also suffers the serious
2 and significant capability to produce false identifications.

3
4 **C. The RIAA's Drift Net Litigation Continues to Capture Innocent Defendants in its Wake**

5 The inaccurate methods outlined above illustrate the bluntness of the RIAA's
6 campaign, one that has been likened to drift net fishing. The RIAA itself has admitted,
7 "When you go fishing with a net, you sometimes are going to catch a few dolphin,"
8 illustrating that they are aware of the ramifications of their litigation. Dennis Roddy, The
9 Song Remains the Same, Pittsburgh Post-Gazette, (Sept. 14, 2003),
10 <<http://www.post-gazette.com/columnists/20030914edrody0914p1.asp>>. One of the
11 first "dolphins" caught by the RIAA was Sarah Ward, a 65-year-old Massachusetts
12 grandmother accused of downloading thousands of "rap" songs using a Microsoft
13 Windows program, despite the fact that she owned a Macintosh computer that could not
14 run the software program in question. John Schwartz, She Says She's No Music Pirate.
15 No Snoop Fan, Either., New York Times, (Sept. 25, 2003),
16 <<http://www.nytimes.com/2003/09/25/business/media/25TUNE.html>>. Others
17 erroneously sued by the RIAA include a woman who did not own a computer at the time
18 of an alleged infringement and a deceased grandmother who hated computers while she
19 was alive. See Download Suit Defense: 'No PC', Red Herring, (Feb. 3, 2006),
20 <<http://www.redherring.com/ArchiveAccess.aspx?url=%2fArticle.aspx%3fa%3d15592>>;
21 see also Toby Coleman, Deceased Woman Named in File-Sharing Suit, Charlestown
22 Gazette, Feb. 4, 2005.

23 In 2004, the RIAA sued Deborah Foster, a woman who vehemently denied
24 participating in any illegal downloading. See Foster, No. Civ. 04-1569-W at *3. The
25 RIAA first amended its complaint in order to include secondary liability claims, but
26 ultimately dropped all of its claims. See id. at *4. The U.S. District Court in the Western
27 District of Oklahoma eventually concluded, "The plaintiffs failed to allege any facts in
28 their complaint that would support Foster's secondary copyright infringement liability"

1 and awarded Foster attorneys' fees. *Id.* at *10. However, by the time the plaintiffs
2 dismissed their claim a year and a half after bringing it, Foster had already made a
3 "considerable" litigation investment. *Id.* at *4. In fact, the Court explicitly found some of
4 the RIAA's motives in pursuing the litigation to be suspect, noting, "[T]here is an
5 appearance that the plaintiffs initiated the secondary infringement claims to press Ms.
6 Foster into settlement after they had ceased to believe she was a direct or "primary"
7 infringer." *Id.* at *11. This is indicative of the kinds of problems that arise under the
8 RIAA's aggressive campaign.

9
10 **D. RIAA Cases Create Perverse Incentives for Innocent Defendants to Settle**

11 Because the RIAA has many more resources than the defendants they litigate
12 against, most defendants choose to settle rather than go to court. These settlements have
13 ranged from \$3,000 to \$11,000, although they are typically concentrated toward the low
14 end of that range. Electronic Frontier Foundation, RIAA v. The People: Two Years
15 Later (2005), at 6, <http://www.eff.org/IP/P2P/RIAAatTWO_FINAL.pdf>. Once the
16 RIAA locates a potential defendant, it immediately offers them a settlement option.
17 These settlements, while still significant for many of the individuals sued, are less than
18 the expense of pursuing the case, and even innocent defendants are tempted to make the
19 logical choice of settling rather than face uncertainty over recovering their attorneys' fees.

20 **IV. ARGUMENT**

21 This case represents an ideal situation for awarding Defendant attorneys' fees.
22 Plaintiffs have brought a baseless claim premised on untested legal theories and suspect
23 evidence as part of an ongoing campaign that fails to properly balance and respect the
24 limits of the Copyright Act. Congress, in § 505 of the Copyright Act, granted courts the
25 power to rectify this imbalance by authorizing them to award attorneys' fees on the basis
26 of equitable discretion. 17 U.S.C. § 505. This Court should award attorneys' fees not
27 only to balance the equities in Leadbetter's case, thereby promoting justice for her, but
28 also in order to further the purposes of the Copyright Act.

1
2 **A. Awarding Attorneys’ Fees in this Case Would Help Balance the Overall**
3 **Equities in the RIAA’s Campaign.**

4 This court has the discretion to award attorneys’ fees to prevailing defendants in
5 copyright cases. Id.; Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). In deciding whether
6 it would be equitable to do so, Fogerty suggests examining (1) whether the suit was
7 frivolous, (2) the plaintiffs’ motivation in bringing the suit, (3) the objective
8 unreasonableness of both the factual and legal components of the case, and (4) the need
9 to advance considerations of compensation and deterrence. Fogerty, 510 U.S. at 535 n.
10 19. In order to preserve the fair administration of justice, this court should award
11 attorneys’ fees to Leadbetter.

12 **1. Plaintiffs’ claims were frivolous.**

13 In Fogerty, the Supreme Court held that frivolousness can be one of the main
14 factors judges use to guide their discretion over attorneys’ fees in copyright cases. If a
15 plaintiff sued frivolously or in bad faith, the Court held, this would weigh in favor of
16 awarding attorneys’ fees to a defendant. Id. at 532 n.16 (“[I]t is proper to award fees to
17 prevailing defendant when copyright action is brought in bad faith, with a motive to ‘vex
18 and harass the defendant,’ or where plaintiff’s claim utterly lacks merit” (citing Cloth v.
19 Hyman, 146 F. Supp. 185, 193 (S.D.N.Y. 1956)). The court also notes, however, that
20 this is not required. Fogerty, 510 U.S. at 532 n.18.

21 Here, there is evidence that Plaintiffs acted frivolously in pursuing claims against
22 Leadbetter. As outlined above, the use of IP addresses to accurately identify individuals
23 who upload and download files in P2P networks is uncertain at best and deeply
24 misleading or false at worst. Thus, in bringing this suit, the RIAA and Plaintiffs knew
25 that the entire basis for identifying Leadbetter as the proper defendant was weak and
26 subject to skepticism. Yet, even after contacting Defendant and learning of her situation
27 and proclaimed innocence, Plaintiffs made the decision to pursue this litigation
28 nonetheless.

 In fact, Plaintiffs went so far as to amend their complaint, changing their

1 allegations to include claims of secondary copyright infringement rather than direct
2 infringement. They did this despite the fact that they had no evidence to support these
3 new claims, and used cookie-cutter and vague language in accusing her of “contributory
4 and/or vicarious infringement,” claims they continued to pursue for six more months.

5 These bad faith acts are compounded by the circumstances of the RIAA’s overall
6 litigation campaign. This is not the first time the RIAA has practiced such reckless and
7 flawed conduct. For example, RIAA-controlled plaintiffs used identical language in
8 suing Deborah Foster under similar circumstances in Capitol v. Foster. See Foster, No.
9 Civ. 04-1569-W at *11 (holding that attorneys’ fees should be awarded to the defendant
10 partially because the claims asserted by the plaintiffs were “untested and marginal” and
11 noting, “The plaintiffs failed to allege any facts in their complaint that would support
12 [Defendant’s] secondary copyright infringement liability.”) Yet despite the Foster court’s
13 warning against bringing these claims, Plaintiffs brought them here in bad faith. Thus,
14 the claims in this litigation are not those of a first-time litigant who might be ignorant or
15 innocent of their erroneous nature or lack of support. Instead, they are part of an ongoing
16 and knowing campaign by the RIAA to pursue these kinds of claims against defendants
17 like Foster and Leadbetter in the hopes that they will succumb to the pressures of
18 litigation. This factor weighs heavily in favor of awarding attorneys’ fees to Leadbetter.

19 **2. Plaintiffs’ motivation in pursuing this action was in bad faith.**

20 The second Fogerty factor to be considered is the plaintiffs’ motivation in suing.
21 510 U.S. at 535 n.19. If, for example, the plaintiffs sue in order to “vex and harass the
22 defendant,” a court should award attorneys’ fees. Id. at 532 n. 16 (citing Cloth, 146 F.
23 Supp. at 193). As outlined above, the overall “dragnet” nature of the RIAA’s campaign
24 and the inaccuracy of its IP Address evidence already raise questions about its
25 motivations for pursuing actions such as this one. In fact, they admitted, “When you go
26 fishing with a net, you sometimes are going to catch a few dolphin,” and yet took no
27 affirmative steps to release the dolphin, Leadbetter, that they caught. Dennis Roddy, The
28 Song Remains the Same, Pittsburgh Post-Gazette, (Sept. 14, 2003),

1 <<http://www.post-gazette.com/columnists/20030914edroddy0914p1.asp>>. The
2 correspondence in the case reflects this. Here, the RIAA sent Leadbetter a notice stating,
3 “[t]he evidence necessary for the record companies to prevail in this action has already
4 been secured,” and suggested that she contact their “Settlement Support Center.” Def.’s
5 Mot. for Att’ys’ Fees at 4. Yet this was false, just as it was false in the Foster case. The
6 Foster court recognized that the RIAA’s litigation approach raised questions of the
7 plaintiffs’ motives. Foster, No. Civ. 04-1569-W at *11. The fact that they pursued their
8 claims against Leadbetter even as she continually asserted her innocence, and did not
9 depose her until a year after suing her, is also indication of an improper motivation. *See*,
10 e.g., Berry v. Hawaiian Express Serv., No. 03-00385, 2006 U.S. Dist. LEXIS 78281, at
11 *28 (Oct. 25, 2006) (Plaintiff’s pursuit of copyright claims against Defendant despite
12 notice that Defendant’s use was non-infringing was “strong indication that he had an
13 improper motivation.”). Furthermore, in the case at bar, Plaintiffs had notice that they
14 should act diligently in pursuing these claims because of the ruling awarding attorneys’
15 fees to the defendant in Foster. Plaintiffs’ motivation in the case at bar, then, points in
16 favor of awarding attorneys’ fees to Leadbetter.

17 **3. Plaintiffs’ claims were legally and factually unreasonable.**

18 The third factor for this court to consider under the Fogerty decision is the
19 “objective unreasonableness of both the factual and legal components of the case.” 510
20 U.S. at 535 n. 19. Here, Plaintiffs’ claims of secondary infringement were objectively
21 unreasonable on both a factual and legal level. Plaintiffs premised their claims on two
22 theories of liability, contributory and vicarious copyright infringement. These are
23 narrowly defined categories of liability, and courts have been reluctant to expand them.
24 *See*, e.g., Perfect 10, Inc. v. Visa International, No. 05-15170, July 3, 2007 at *8 (9th Cir.
25 2007) (“To find that Defendants’ activities fall within the scope of such tests would
26 require a radical and inappropriate expansion of existing principles of secondary liability
27 and would violate the public policy of the United States.”). Contributory infringement
28 occurs when a defendant, with specific knowledge of actual infringing conduct, (1)

1 materially contributes to that conduct or (2) intentionally induces or encourages direct
2 infringement. Perfect 10, Inc. v. Visa International, No. 05-15170, July 3, 2007 at *8
3 (9th Cir. 2007); *see also* Perfect 10, Inc. v. Amazon.com, Inc., No. 06-55405, 2007 U.S.
4 App. LEXIS 11420, at *53-54 (9th Cir. May 16, 2007) (citing MGM Studios, Inc. v.
5 Grokster, Ltd., 545 U.S. 913, 930 (2005)); A&M Records v. Napster, Inc., 239 F. 3d
6 1004, 1019 (9th Cir. 2001). In the case at bar, Plaintiffs never had any evidence that
7 Leadbetter possessed specific knowledge of any actual infringing conduct taking place
8 through her internet account. Def.’s Mot. for Att’y’s Fees, 5. Nor did they have *any*
9 evidence that she encouraged or induced anyone to infringe any of Plaintiffs’ copyrights,
10 before or after they filed suit. Id. Additionally, there are no legal precedents holding an
11 individual in Leadbetter’s position liable for the mere possession of an Internet account
12 upon which infringement allegedly occurred. In fact, as noted by the Foster Court, such a
13 theory is “untested and marginal” at best. Foster, No. Civ. 04-1569-W at *11.

14 Vicarious liability was an even further reach for Plaintiffs. In order to be liable for
15 vicarious infringement, a defendant must (1) derive a direct financial benefit from the
16 infringing conduct and (2) have the ability to control and supervise the infringing conduct
17 at issue. Perfect 10 v. Amazon, No. 06-55405 at *64 (finding Google was not vicariously
18 liable for indexing websites that contained allegedly infringing materials). Here, again,
19 there was no evidence to support either element of this claim, nor could there be under
20 Plaintiffs’ theory of the case. Even if another individual in Leadbetter’s home were using
21 her account to infringe copyrights, this would not provide any financial benefit to
22 Leadbetter herself. Cf. Napster 239 F.3d at 1023 (holding that defendant derived a direct
23 financial benefit through the infringing material in question by acting as a draw for
24 commercial customers, thereby receiving more advertising revenue), Fonovisa, Inc. v.
25 Cherry Auction, Inc., 73 F.3d 259, 263 (9th Cir. 1996) (holding that defendant derived a
26 direct financial benefit because they reaped substantial income from fees that “flow[ed]
27 directly from [consumers of infringing material]”). Nor would Plaintiffs have been able
28 to show Leadbetter’s ability to supervise and control such conduct, absent evidence that

1 she was specifically aware of its existence and present at the computer when the conduct
2 was occurring. See Perfect 10, Inc. v. Visa International, No. 05-15170, July 3, 2007 at
3 *20 (9th Cir. 2007) (holding that Visa was not vicariously liable for offering services on
4 infringing websites because they had no direct control over the websites' content); cf.
5 Fonovisa, 73 F.3d at 263 (finding security personnel at flea market who routinely
6 observed vendors distributing infringing goods had the ability to supervise and control
7 infringing conduct); Gershwin Publishing Corp. v. Columbia Artists Management, Inc.,
8 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that a defendant was vicariously liable
9 because they had the "right and ability" to supervise infringing activity). In Foster, "[t]he
10 plaintiffs appear[ed] to base their secondary liability claims against Ms. Foster solely on
11 the fact that she maintained an Internet account which a member of her household utilized
12 to infringe the plaintiffs' copyrights." Foster, No. Civ. 04-1569-W at *8. In the case at
13 bar, it is not even clear that a member of Leadbetter's household infringed copyright, but
14 the Plaintiffs put forward similar claims anyway. The Court found these claims to be
15 untested and marginal, noting, "neither the parties' submissions nor the Court's own
16 research has revealed any case holding the mere owner of an Internet account
17 contributorily or vicariously liable for the infringing activities of third persons." Foster,
18 No. Civ. 04-1569-W at * 10. In sum, Plaintiffs brought their claims of contributory and
19 vicarious copyright liability against Leadbetter without any reasonable basis in fact or law
20 to support them. Thus, these claims were objectively unreasonable. This weighs in favor
21 of awarding attorneys' fees to Leadbetter.

22
23 **4. The Court should award Defendant his fees to (i) compensate him
and (ii) deter Plaintiffs from future bad faith litigation**

24 Finally, the Fogerty decision urges the court to consider the twin concerns of
25 compensation and deterrence. 510 U.S. at 535 n. 19. In a case such as the one at bar,
26 where the equities are so imbalanced, compensation is an extremely important
27 consideration. In Assessment Technologies of Wi, LLC v. Wire Data, Inc., Judge Posner
28 wrote:

1 When the prevailing party is the defendant, who by definition receives not a
2 small award but no award, the presumption in favor of awarding fees is very
3 strong. For without the prospect of such an award, the party might be forced
4 into a nuisance settlement or deterred altogether from enforcing his rights.

5 Assessment Technologies of Wi, LLC v. Wire Data, Inc., 361 F.3d 434, 437 (7th Cir.
6 2004) (emphasis added; internal citations omitted).

7 In this case, where the defendant has very limited resources compared to the
8 plaintiff, this argument becomes even stronger. Furthermore, Judge Posner stated that if
9 the claim was frivolous and the prevailing party received no relief at all, the case for
10 attorneys' fees is "compelling." Id., see also Foster, No. Civ. 04-1569-W at *6. Such
11 logic applies in Leadbetter's case, as well. Plaintiffs are several multibillion-dollar
12 corporations targeting (often indiscriminately) individual defendants as part of a massive
13 dragnet litigation campaign. Due to the economies of scale they enjoy, the attorney work
14 product and administrative costs for any one case are marginal at best and can be spread
15 out over thousands of complaints, motions, and legal research tasks. Defendants, on the
16 other hand, must each individually summon the funds and support necessary to defend
17 themselves in each individual case. In prevailing on Plaintiffs' copyright claims,
18 Defendant Leadbetter receives no relief at all. Nor would she or any future innocent
19 defendant have sufficient incentives to resist being forced into a nuisance settlement with
20 the RIAA and defend her rights without the prospect of fees. This is especially true given
21 that the RIAA typically offers settlements to defendants such as Leadbetter between
22 \$3,000 and \$5,000 – significantly below the legal costs Leadbetter has incurred in this
23 action. As the Seventh Circuit noted, in such situations "the cost of vindication exceeds
24 the private benefit to the party." Assessment Technologies, 361 F.3d at 437. Therefore,
25 if attorneys' fees are not provided to Leadbetter and other innocent defendants, they will
26 choose not to defend themselves against meritless claims, thwarting the fair
27 administration of justice and proper use of the court system. Therefore, the consideration
28

1 of compensation points in favor of awarding attorneys' fees to Leadbetter.¹

2 The deterrence factor also weighs in favor of granting Defendant's application for
3 fees. As noted above, the individual cost of bringing a single case for an RIAA company
4 is quite small because such costs are spread out over thousands of cases nationwide.
5 Therefore, the normal economics and high cost of litigation are unlikely to deter any
6 single suit, even where an RIAA plaintiff lacks sufficient factual or legal support for the
7 case. The only remaining deterrent is an award of attorneys' fees to successful
8 defendants. Such an award will dramatically increase the individual cost of each
9 unwarranted case the RIAA brings, forcing them to realize the impact of their mistakes on
10 the defendants they pursue as well as the court resources they consume.

11 As award of fees will also deter the RIAA from bringing cases based on nothing
12 more than suspect IP address information. As noted above, serious flaws exist in the
13 RIAA's methodology for identifying the proper defendant for its P2P lawsuits. If this
14 court and others award fees to defendants like Leadbetter, this will deter the RIAA from
15 pursuing such cases where the evidence fails to support the correlation between the IP
16 address information they collect and the accusations of infringement they make. It will
17 also encourage it to improve its investigation techniques where possible, creating
18 incentives to use more accurate technology and methodologies.

19 Furthermore, it is also important to deter the RIAA from pursuing meritless suits in
20 order to promote judicial economy. Those appropriately caught by the RIAA's
21 investigation will most likely settle rather than face the much steeper fines that courts
22 may impose on them. *See* 17 U.S.C. § 504 (authorizing statutory damages of \$750 to
23 \$150,000 per work infringed). However, when innocent people are accidentally caught
24 by the RIAA's dragnet, the RIAA should be encouraged to drop those cases as quickly as
25

26
27 ¹ Importantly, attorneys' fees benefit not only wrongly accused defendants, but also the lawyers who are
28 willing to defend them. Some lawyers may take cases such as these on a pro bono basis, but most attorneys cannot
afford to do so. By allowing recovery of attorneys' fees and costs, the court may encourage more lawyers to accept
representation of innocent clients in RIAA cases. Therefore, attorneys' fees in this case would
provide proper incentives for attorneys litigating future RIAA cases as well.

1 possible, even prior to the filing of a complaint. Unless courts award fees to defendants
2 such as Leadbetter, however, the RIAA will continue to file their complaints and pursue
3 them until the very last moment, eating up judicial resources that would be better spent on
4 more meritorious cases. Accordingly, this Court should award fees to Defendant to
5 encourage the RIAA to investigate its cases diligently, and not pursue frivolous claims
6 simply in order to create settlement leverage on a massive nationwide scale. Through
7 these measures of compensation and deterrence, this Court can promote justice by
8 awarding attorneys' fees to Leadbetter.

9
10 **B. Awarding Attorneys' Fees Furthers the Purpose and Policies of the
Copyright Act**

11 In addition to the individual considerations that favor the award of attorneys' fees,
12 copyright policy considerations also favor this award. The Fogerty Court recognized the
13 important role that these considerations play. While discussing the four main factors in
14 its opinion, the Court stated, "[S]uch factors may be used to guide courts' discretion, so
15 long as such factors are faithful to the purposes of the Copyright Act." 510 U.S. at 535
16 n. 19. This is particularly important, the Court held, where potential ambiguities in
17 copyright law exist and further clarification of the law would assist the public in
18 understanding its rights. *See Fogerty*, 510 U.S. at 527 ("Because copyright law ultimately
19 serves the purpose of enriching the general public through access to creative works, it is
20 peculiarly important that the boundaries of copyright law be demarcated as clearly as
21 possible. To that end, defendants who seek to advance a variety of meritorious copyright
22 defenses should be encouraged to litigate them to the same extent that plaintiffs are
23 encouraged to litigate meritorious claims of infringement."); Neil Weinstock Netanel,
24 Copyright and a Democratic Civil Society, 106 Yale L.J. 283, 285 (1996) ("To encourage
25 authors to create and disseminate original expression, [copyright law] accords them a
26 bundle of proprietary rights in their works. But to promote public education and creative
27 exchange, it invites audiences and subsequent authors to use existing works in every
28 conceivable manner that falls outside the province of the copyright owner's exclusive

1 rights.”).

2 This is not just a theoretical problem. Real problems occur when copyright law is
3 undefined at the margins. James Gibson has identified this as “doctrinal feedback” that
4 often occurs within the realm of intellectual property law. He describes the “license [or,
5 in this case, settle], don’t litigate” approach that many companies endorse, and discusses
6 how this approach encourages people to assume that works in the gray area of copyright
7 are protected, while they may in fact belong to the public. James Gibson, Risk Aversion
8 and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882, 891 (2007).

9 “When filmmakers, writers, and other artists avoid using some of our most meaningful
10 cultural referents for fear of being sued, culture suffers.” Id. at 933.

11 Therefore, it is extremely important to the purpose and policies of the Copyright
12 Act that the Court help further define the law when copyright owners such as Plaintiffs
13 attempt to claim areas they do not own as their own. Otherwise, the public loses
14 something that the Copyright Act implicitly gave it. *See Netanel, supra* at 296
15 (“Significantly, the social harm resulting from th[e] silencing of [non-infringing activities]
16 goes far beyond the loss to consumers who would otherwise have paid to read, view, or
17 listen to [the copyrighted material]. Robust public debate, the spread of knowledge, and
18 the questioning of cultural hierarchy are of paramount importance to a democratic
19 society. To the extent that these activities bolster democratic institutions, all citizens
20 benefit from their occurrence.”).

21 Here, Defendant Leadbetter challenged Plaintiffs’ untested and marginal legal
22 theories directly and advanced a variety of meritorious copyright defenses, ultimately
23 prevailing. This serves the public policies of the Copyright Act, not only by helping to
24 clarify the boundaries of liability for internet account holders and users, but also for
25 parents who might otherwise be chilled and deterred from allowing their children and
26 other parties to experience the full benefits of the digital age and the Internet via use of
27 their computers and internet accounts. Without a strong message from this Court, the
28 RIAA will continue to bring such claims on insufficient facts and theories. This allows

1 the RIAA to deter legitimate internet use by creating fear that such use would result in
2 allegations of vicarious and contributory infringement, even when the parent has no
3 knowledge or involvement in any infringing conduct.

4 **V. CONCLUSION**

5 The Court should grant Defendants' motion for attorneys' fees and costs (Dkt.
6 # 86) for the foregoing reasons, and award reasonable attorneys fees to Defendant
7 Dawnell Leadbetter in this case.

8
9 DATED this 5th day of July, 2007.

10
11 **NEWMAN & NEWMAN,
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12 

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