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United States District Court  
Central District of California  
Western Division

OMEGA S.A., *et al.*,  
Plaintiffs,  
v.  
COSTCO WHOLESALE CORPORATION,  
Defendant.

CV 04-05443 TJH (RCx)

Order  
[416]

The Court has considered Defendant’s renewed motion for attorney’s fees, together with the moving and opposing papers.

The Court may award reasonable attorneys’ fees to the prevailing party in a copyright infringement action. 17 U.S.C. § 505. There are five non-exclusive factors to consider in determining whether to award fees in copyright cases: (1) The degree of success obtained by the prevailing party; (2) The frivolousness of the claim; (3) The plaintiff’s motivation in bringing a claim; (4) The objective reasonableness of the losing party’s legal and factual arguments; and (5) The need to advance considerations of compensation and deterrence. *Jackson v. Axton*, 25

1 F.3d 884, 890 (9th Cir. 1994). These factors should be relied upon only to the  
2 extent that doing so is faithful to the purposes of the Copyright Act. *Fantasy, Inc.*  
3 *v. Fogerty*, 94 F.3d 553, 558 (9th Cir. 1996)

4 First, Costco achieved a high degree of success by defeating Omega's  
5 infringement claim. Second, Omega's infringement suit was improperly motivated  
6 – the reason this Court ruled that Omega misused its copyright. Third, awarding  
7 Costco attorneys' fees would encourage future defendants to resist improperly-  
8 motivated infringement actions, and would deter the filing of such actions. *See*  
9 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527, 114 S. Ct. 1023, 1030, 127 L. Ed. 2d  
10 455, 465 (1994). Fourth, even though Costco does not assert this, Omega's  
11 infringement action was arguably unreasonable and frivolous. While one segment  
12 of Omega's claim raised issues sufficiently ambiguous to split the Supreme Court,  
13 the claim as a whole was clearly not one properly raised under copyright law. As  
14 the Supreme Court has explained, "copyright law ultimately serves the purpose of  
15 enriching the general public through access to creative works ... ." *Fogerty* 510  
16 U.S. at 527, 114 S. Ct. at 1030, 127 L. Ed. 2d at 465. By affixing a barely  
17 perceptible copyrighted design to the back of some of its watches, Omega did not  
18 provide – and did not seek to provide – creative works to the general public. Omega  
19 sought to exert control over its watches, control which it believed it could not  
20 otherwise exert. Thus, even though the defense of copyright misuse may not have  
21 been articulated in a way that explicitly and directly prohibited Omega's particular  
22 actions, it should have been clear to Omega that its actions were not condoned or  
23 protected by copyright law.

24 Based on Costco's first motion for attorneys' fees filed before the case was  
25 appealed to the Ninth Circuit, this Court awarded \$373,003.80. Now, Costco seeks  
26 \$316,095.80 of the previously awarded \$373,003.80, as it has subtracted \$56,908.00

1 for fees related to its first motion for summary judgement (which was granted by this  
 2 Court, but rejected by the Ninth Circuit), plus an additional \$301,463.10 in fees for  
 3 work performed since the case was remanded back to this Court. Of the  
 4 \$301,463.10 Costco requests in fees related to work since remand, the Court awards  
 5 \$80,748.37 as reasonable attorneys' fees. This reduction – the result of reductions  
 6 in billed hours and billing rates – is necessary to ensure the reasonableness of the fee  
 7 award.

8 In total, the Court will award Costco reasonable attorneys' fees of  
 9 \$396,844.17. The below charts detail the reasonable hours and rates upon which  
 10 this award is based.

11  
 12 **A. First round of litigation at district court level (2004 - 2007)**

13 **TABLE A1: HOURS WORKED**

14	<b>Tasks</b>	<b>Billed Hrs</b>	<b>Awarded Hrs</b>
15	Legal Research	213.7	100
16	Factual Research	27.3	27.3
17	Case Strategy	21.8	21.8
18	Opposing preliminary injunction	15.6	15.6
19	Responding to the complaint and first-amended 20 complaint	55	20
21	Opposition to Omega's motion to strike	51.3	30
22	Rule 26(a) and 26(f) tasks	5.9	5.9
23	Responding to written discovery	64.4	64.4
24	Propounding written discovery	97.6	97.6
25	Depositions	193.8	193.8

1	Document production	56.2	56.2
2	Reviewing documents produced by plaintiffs and	65.5	65.5
3	third parties		
4	Third party subpoenas	83.1	20
5	Motions to compel	442.2	442.2
6	Settlement	17.8	17.8
7	Dismissal of swatch	5.4	5.4
8	Opposition to Omega's motion for summary	182.6	100
9	judgment		
10	Costco's motion for summary judgment	174	100
11	Pretrial conference tasks	54.1	20
12	Preparing pretrial documents	231.8	25
13	Jury instructions and special verdict form	54.9	20
14	Motions <i>in limine</i>	53.8	35
15	Trial preparation	297.6	100
16	Post-judgment tasks	92	20
17	<b>Total</b>	<b>2557.4</b>	<b>1603.5</b>

TABLE A2: HOURLY RATES

Attorney Name	Billed Rates	Awarded Rates
Levine	\$495.00 – 510.00	\$400.00
Moss	\$325.00 – 410.00	\$295.00
Banks	\$235.00 – 295.00	\$225.00
McNamee (paralegal)	\$175.00 – 180.00	\$100.00
Clevenger (paralegal)	\$160.00 – 170.00	\$100.0

**B. Second round of litigation at District Court level (2007 - 2012)**

**TABLE B1: HOURS WORKED**

<b>Tasks</b>	<b>Billed Hrs</b>	<b>Awarded Hrs</b>
Legal Research	3.8	3.8
Factual Research	1.1	1.1
Opposition to motion to strike	10.4	10.4
Responding to written discovery	4.6	4.6
Propounding written discovery	4.6	4.6
Settlement	17.8	17.8
Preparing pretrial documents	23.8	23.8
Jury instructions and verdict form	54.9	54.9
Motions <i>in limine</i>	11.8	11.8
Trial preparation	44.4	44.4
District court proceedings after remand	7.4	7.4
Opposing Renewed Motion for Summary Judgment	43	21.5
Filing and Opposing Cross-Motions for Summary Judgment / Partial Summary Judgment re: Copyright Misuse	222.1	100
Motion for Attorney's Fees	244.6	20
<b>Total</b>	<b>694.3</b>	<b>356.1</b>

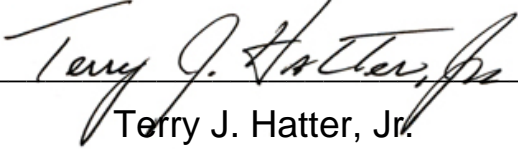
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TABLE B2: HOURLY RATES

Attorney Name	Billed Rates	Awarded Rates
Levine	\$510.00 – 650.00	\$440.00
Moss	\$410.00 – 480.00	\$324.00
Banks	\$295.00 – 400.00	\$247.00
Molen	\$325.00	\$225.00
McNamee (paralegal)	\$180.00 – 195.00	\$100.00

It is Ordered that the motion be, and hereby is, Granted in the amount of \$396,844.17.

Date: June 20, 2012

  
 Terry J. Hatter, Jr.  
 Senior United States District Judge

CC:FISCAL