

\*\* NOT FOR PRINTED PUBLICATION \*\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION

|                             |   |                              |
|-----------------------------|---|------------------------------|
| KRYPTTEK OUTDOOR GROUP, LLC | § |                              |
|                             | § |                              |
| <i>Plaintiff,</i>           | § |                              |
|                             | § | CIVIL ACTION No. 1:15-cv-348 |
| v.                          | § |                              |
|                             | § | JUDGE RON CLARK              |
| SALT ARMOUR, INC.,          | § |                              |
| ALPHA DEFENSE, INC., AND    | § | BRC                          |
| THOMAS J. DE SERNIA,        | § |                              |
|                             | § |                              |
| <i>Defendants.</i>          | § |                              |

**ORDER**

The court previously GRANTED IN PART Kryptek’s Motion for Default Judgment, holding that Kryptek’s Complaint contained sufficient facts taken as true to establish design patent infringement and trademark infringement but not copyright infringement or trade dress infringement. [Order DJ, Dkt. # 16]. On March 2, 2016, the court held an evidentiary hearing on damages. As part of that hearing Kryptek argued that the court should reconsider its denial of default judgment on copyright infringement.<sup>1</sup>

The court grants Kryptek’s request for reconsideration and holds that Kryptek is entitled to default judgment on its claim of copyright infringement. The court had previously required Kryptek’s claim of copyright infringement to contain sufficient facts taken as true to satisfy the many elements of a claim of copyright infringement. During the hearing, Kryptek presented case

---

<sup>1</sup> Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (Federal Question) and 1338(a) (Patents) because this is a civil action for infringement of design patents, copyrights, and trademarks under 35 U.S.C. § 271(a), 17 U.S.C. § 501, and 15 U.S.C. § 1114, respectively. Venue is appropriate in this district because Defendants have sold infringing products here. 28 U.S.C. §1400(b); *see also* PX 13 (March 2, 2016 hearing) (order shipped to Beaumont).

law that the proper standard for a default judgment in the Fifth Circuit is the notice pleading standard under Rule 8 of the Federal Rules of Civil Procedure. *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498 (5th Cir. 2015). Failure to apply this standard constitutes a manifest error of law warranting reconsideration. Kryptek is entitled to a default judgment on its claim of copyright infringement because its complaint and the evidence presented at the hearing satisfies the notice pleading standard.

Kryptek's evidence at the hearing also establishes that Kryptek is entitled to \$1,075,000.00 in damages, \$76,893.50 in attorney's fees, and \$575.98 in costs.

### **I. Kryptek's Request for Reconsideration**

#### **A. Legal Standard on Reconsideration**

The Federal Rules of Civil Procedure do not specifically provide for a motion for reconsideration. *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir. 1991). Such a motion will be treated as either a motion to alter or amend under Federal Rule of Civil Procedure 59(e), or as a motion for relief from judgment under Rule 60(b). *Id.* Whether the court considers the motion under Rule 59(e) or 60(b) depends on the time at which the motion was filed. *Id.* at 347 n.3. If the motion was filed within the time period provided by Rule 59(e)—twenty-eight days—the motion falls under 59(e); if it was filed after that time, it falls under 60(b). *Id.* Because Kryptek's request was brought within twenty-eight days of the court issuing the Order on Default Judgment, the court analyzes this motion under Rule 59(e).

A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). "Reconsideration of a judgment is an extraordinary remedy which courts should use sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). The remedy is so extraordinary that the Fifth Circuit has directed that

the Rule 59(e) standards “favor the denial of motions to alter or amend a judgment.” *S. Constructors Grp., Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993) (citation omitted). Such motions “serve the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.” *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). A “manifest error” is one that is “plain and indisputable, and that amounts to a complete disregard of the controlling law.” *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004).

“[T]he district court has considerable discretion in deciding whether to reopen a case under Rule 59(e).” *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993). Considerations limiting this discretion include “(1) finality, and (2) the need to render just decisions on the basis of all the facts.” *Id.* A Rule 59(e) motion should not be used to relitigate prior matters that should have been urged earlier or that simply have been resolved to the movant’s dissatisfaction. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990).

B. Reconsideration Is Warranted.

In its previous Order the court held that Kryptek was not entitled to a default judgment on its claim of copyright infringement because the Complaint did not contain sufficient facts taken as true to establish all of the elements of copyright infringement. [Order DJ, Dkt. # 16, at pp. 3–6]. The correct standard is whether or not the Complaint met the minimum standards of Rule 8 of the Federal Rules of Civil Procedure. *See Wooten*, 788 F.3d at 498. Rule 8 requires the pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8. Reconsideration is warranted because the incorrect standard was used in the court’s prior Order.

The need for finality in judgments does not disturb this conclusion. Defendants have not

appeared in this matter, have filed no responses to any motions, and the court has not entered a final judgment or a permanent injunction. Under these circumstances, Defendants will not be disturbed by the court granting reconsideration.

The court must also consider the need to render just decisions on the basis of all the facts. The need to render just decisions favors reconsideration of the court's prior holding regarding copyright infringement.

## **II. Kryptek Is Entitled to Default Judgment on Its Claim of Copyright Infringement**

As explained in the court's Order on Default Judgment, Kryptek has met all of the procedural requirements of a default judgment. [Order DJ, Dkt. # 16, at p. 2]. After the clerk enters a default, "the plaintiff's well-pleaded factual allegations are taken as true, except regarding damages." *U.S. for Use of M-Co Constr., Inc. v. Shipco Gen., Inc.*, 814 F.2d 1011, 1014 (5th Cir. 1987).

In addressing whether a party is entitled to default judgment, the Fifth Circuit requires that the complaint meets the minimum standards of Rule 8 of the Federal Rules of Civil Procedure. *Wooten*, 788 F.3d at 498. Rule 8 requires the pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of this requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). If the complaint meets this standard, the court may conduct an evidentiary hearing and receive testimony for the limited purpose of establishing the truth of the allegations by evidence or determine the amount of damages. FED. R. CIV. P. 55(b)(2); *Wooten*, 788 F.3d at 498.

The Complaint satisfies the standard of Rule 8. Kryptek alleges that it owns the copyrights at issue. [Compl., Dkt. # 1, at ¶¶ 49–50]. It alleges that Defendants have infringed

these copyrights by selling exact copies of its works on several websites. [Compl., Dkt. # 1, at ¶ 72]. The complaint includes printouts of websites containing the allegedly-infringing products. [Dkt. ## 1-11 (Ex. J), 1-12 (Ex. K)]. These factual allegations are “enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (2007). They present “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The requirements of Rule 8 are satisfied for this claim.<sup>2</sup>

The evidence presented at the hearing can be considered to establish the truth of the allegations in the Complaint. *See Wooten*, 788 F.3d at 498 (quoting Federal Rule of Civil Procedure 58(b)(2)(C)). Kryptek provided physical examples of several of its products [PX ## 14–17] and Defendants’ products [Dkt. ## 14a, 15a, 16a, and 17a]. On visual inspection, Defendants’ products appear to contain the same camouflage patterns as Kryptek’s protected products. Kryptek also provided pictures of Defendants’ boat wrap (a vinyl decorative covering for boats) that contains the same pattern as Kryptek’s Pontus camouflage pattern. *Compare* [PX # 10, at pp. 2, 7 of 14] (Defendants’ boat wrap) *with* [PX # 5, at p. 6] (Kryptek’s Pontus camouflage). This evidence supports the truthfulness of the allegation that Defendants have infringed Kryptek’s copyrights.

In light of the allegations in Kryptek’s Complaint and the evidence produced at the hearing, Kryptek is entitled to a default judgment on its claim of copyright infringement.

### **III. Damages**

As damages for design patent and copyright infringement, Kryptek requests a reasonable royalty equal to the amount of the average minimum royalty under an established license covering both design patents and copyrights. [Mot. DJ, Dkt. # 13, at p. 1]. Kryptek does not seek

---

<sup>2</sup> The court notes that the facts identified in its prior Order regarding design patent infringement and trademark infringement are sufficient to meet the standard under Rule 8.

monetary relief for trademark infringement.

A. Legal Standard on Damages

The infringer of a design patent is “liable to the owner to the extent of his total profit.” 35 U.S.C. § 289. The Federal Circuit has consistently interpreted this statute as permitting recovery of an infringer’s entire profit, with no requirement that the patentee apportion profits attributable to the design from profits attributable to the article. *See Apple Inc. v. Samsung Elecs. Co.*, 786 F.3d 983, 1001–02 (Fed. Cir. 2015).

A reasonable royalty is available as damages for design patent infringement. 35 U.S.C. § 284; *Nordock, Inc. v. Sys. Inc.*, 803 F.3d 1344, 1353 (Fed. Cir. 2015). Calculation of a reasonable royalty is typically grounded on the fifteen factors set out in, and the cases expounding upon, *Georgia-Pacific Corp. v. U.S. Plywood Co.*, 318 F. Supp. 1116 (S.D.N.Y. 1970). The *Georgia-Pacific* approach asks the fact-finder to determine the royalty upon which the parties would have agreed at a hypothetical negotiation taking place just before infringement began. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324–25 (Fed. Cir. 2009). A reasonable royalty “may be based upon an established royalty, if there is one, or if not, upon the supposed result of hypothetical negotiations between the plaintiff and defendant.” *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995). “When the patentee has consistently licensed others to engage in conduct comparable to the defendant’s at a uniform royalty, that royalty is taken as established and indicates the terms upon which the patentee would have licensed the defendant’s use of the invention.” *Monsanto Co. v. McFarling*, 488 F.3d 973, 979 (Fed. Cir. 2007).

A reasonable royalty is also available as damages for copyright infringement. *See Gaylord v. United States*, 777 F.3d 1363, 1367 (Fed. Cir. 2015) (approving of the use of a reasonable royalty as a measure of actual damages for copyright infringement). Such recovery is

similar to that for patent infringement, in that it may be based on a hypothetical negotiation between the parties and past arms-length practices may be considered. *Gaylord*, 777 F.3d at 1367–68. This hypothetical negotiation “must be tied to the particular work at issue and its marketplace value—much as, in patent law, the determination must be tied to the particular patented technology and its footprint in the market.” *Id.* at 1368. But a court need not follow “every aspect” of the reasonable royalty calculation in patent law. *Id.* at 1367. For example, courts have not required consideration of the *Georgia-Pacific* factors in upholding awards of reasonable royalties for copyright infringement. *Id.* at 1372; *On Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001), *as amended* (May 15, 2001).

B. Analysis

As a starting point for a hypothetical licensing negotiation between the parties, Kryptek provided a declaration from its CEO, Butch Whiting, stating that licenses to use its camouflage designs, including those protected by copyrights and design patents, generally run for three years and require a running royalty on products sold or an annual minimum royalty for each year of a licensing agreement. [Whiting Decl., Dkt. # 12-1, at ¶ 4]. Kryptek requests that the court enter the average annual minimum royalty amount for a three-year license, \$1,075,000.00, as damages for Kryptek’s infringement.

At the evidentiary hearing, Kryptek provided additional evidence supporting its damages request, as permitted under the Federal Rules. *See Wooten*, 788 F.3d at 500 (stating that “evidence received at the damages prove-up hearing served a permissible purpose under Rule 55(b)(2)—to ‘establish the truth of any allegation by evidence’ or ‘investigate any other matter’”). Kryptek provide copies of three prior licenses (PX ## 21–23) and testimony from Kryptek Chairman Camp Bailey. The licenses generally run for three years. [PX # 21, 23]. While the

PX # 22 total minimum royalties are roughly 12% less than Kryptek's requested amount, the PX # 21 minimum royalties are roughly three times Kryptek's requested amount. And PX # 21 was signed by a company that, like Defendants, used Kryptek's hunting and fishing patterns on its products. The court also notes that the Defendants have a strong social media presence with 526,000 followers on Instagram [PX 7], 378,762 Facebook likes [PX 8], and 10,300 followers on Twitter [PX 9].<sup>3</sup> This suggests that Defendants are likely to have a high sales volume and would have been subject to an average minimum royalty, as requested by Kryptek. The court concludes that \$1,075,000.00 is a reasonable estimate for a royalty that would be obtained in a hypothetical negotiation between the parties.

The evidence presented at the hearing also supports liability for the full three years of royalty payments. Kryptek stated that Defendants had been infringing for thirteen months, based on an order placed on January 31, 2015. [PX # 13]. The court asked why Kryptek should obtain three years of damages for thirteen months of infringement. Mr. Bailey testified that a Kryptek licensee would be liable for the entire three years of royalty payments, even if the license was terminated early. In doing so, he pointed to the following portions of Kryptek's most recent license:

3.3 Minimum Guaranteed Royalty. Licensee will pay to Licensor the Annual Minimum Guarantee specified in Exhibit A, which shall be non-refundable and non-recoupable.

12.1 If this Agreement is terminated for any reason: . . . (ii) Licensee shall immediately tender payment of all sums due to Licensor as of the effective date of termination . . . . For the avoidance of doubt, nothing in the Agreement will be construed to release either Party from any obligation that matured prior to the effective date of termination, or which by their terms survive termination of this Agreement.

p. 11: In the event this Agreement is terminated by Licensee, all remaining

---

<sup>3</sup> By comparison, Mr. Bailey testified that Kryptek has 165,000 Facebook likes.



Minimum Guaranteed Royalties and deferred shortfalls thereof shall become immediately due and payable to Licensor.

[PX # 21]. This is sufficient to establish that Defendants, as prospective licensees in a hypothetical negotiation, would be liable for the full three years of average minimum royalty payments.

In this case, further adjustment of the reasonable royalty amount based on the *Georgia-Pacific* factors is not warranted. Kryptek specifically argues that the following *Georgia-Pacific* factors favor an increase in the reasonable royalty:

Factor 5: The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter.

Factor 6: The duration of the patent and the term of the license.

Factor 8: The established profitability of the product made under the patent; its commercial success; and its current popularity.

Factor 9: The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results.

Factor 10: The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention.

The commercial relationship between the parties does not favor an increase in the reasonable royalty (factor 5). While the parties are competitors in the camouflage goods community, Defendants appear to primarily sell camouflage backpacks, baseball caps, face shields, and arm bands. [Dkt. ## 1-11 (Ex. J), 1-12 (Ex. K)]. The only identified Kryptek products are jackets, vests, pants, and baseball caps. [Compl., Dkt. # 1, at ¶ 51]. Baseball caps are the only competing product advertised by both companies. This hardly seems sufficient to justify an increase in the reasonable royalty.

The duration of the patent term and the license also does not justify an increase in the

reasonable royalty (factor 7). Kryptek's design patents issued in 2013 and have a long remaining term that would normally justify an increase in the reasonable royalty. The term of protection for the copyrights is even longer. But the standard license term is only three years in length, regardless of the term of protection for the intellectual property, and renewable for one-year increments thereafter. [Whiting Decl., Dkt. # 12-1, at ¶ 4]. This factor does not favor an increase of the reasonable royalty.

In this case, where Defendants have not responded or produced evidence of sales, the reasonable royalty amount represents Kryptek's total profits in the form of minimum royalty payments. Because the reasonable royalty represents total profit based on both copyrights and design patents, the court will not abrogate Kryptek's recovery for the design patents at issue. *See Apple*, 786 F.3d at 1001–02.

For these reasons, the court will assess a reasonable royalty of \$1,075,000.00 for infringement of design patents and copyrights.

#### **IV. Attorney's Fees**

There are two parts to Kryptek's request for attorney's fees. The first part is \$56,236.00 for work preceding the court's ruling on the Motion for Default Judgment. This primarily involved preparing the Complaint and the Motion for Default Judgment. The second part is \$22,870.00 that was billed in preparation for the evidentiary hearing, which included preparing 25 exhibits and a Power Point Presentation. For the reasons stated below, an award of attorney's fees in the amount of \$76,893.50 is granted.

##### **A. Legal Standard on Attorney's Fees**

The Fifth Circuit uses the lodestar method to calculate the proper amount of attorney's fees to be awarded. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998). Under the

lodestar method, the court determines the reasonable number of hours expended on the litigation and the reasonable hourly rates for participating attorneys and multiplies these two figures together to arrive at the lodestar. *Id.* “[T]he burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Blum v. Stenson*, 104 S. Ct. 1541, 1547 n.11 (1984). *See also Tollett v. City of Kemah*, 285 F.3d 357, 368 (5th Cir. 2002) (“Generally, the reasonable hourly rate for a particular community is established through affidavits of other attorneys practicing there.”).

“Where the documentation of hours is inadequate, the district court may reduce the award accordingly.” *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983). “Litigants clearly ‘take their chances’ that the district court will reject or reduce fee awards if they submit vague or incomplete applications.” *Wegner v. Standard Ins.*, 129 F.3d 814, 822 (5th Cir. 1997) (quoting *Kellstrom*, 50 F.3d at 326–27). The court is not required to request additional briefing regarding the reasonableness of attorney’s fees.

The lodestar amount is presumptively reasonable and should only be adjusted in exceptional circumstances based on the following *Johnson* factors: (1) the time and labor required for litigation; (2) the novelty and complexity of the issues; (3) the skill required to properly litigate the issues; (4) whether the attorneys had to refuse other work to litigate the case; (5) the attorneys’ customary fee; (6) whether the fee was fixed or contingent; (7) whether the client or case circumstances imposed any time constraints; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) whether the case was undesirable; (11) the type of attorney-client relationship and whether the relationship was longstanding; and (12) awards made in similar cases. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19

(5th Cir. 1974).

When a party seeks attorney’s fees for several claims, the general rule is that the party must “segregate fees between claims for which they are recoverable and claims for which they are not.” *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 298 (5th Cir. 2007) (quoting *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006)). This general rule does not apply to claims that are so interrelated that the time and fees cannot be segregated. *Navigant*, 508 F.3d at 298 (citing *Chapa*, 212 S.W.3d at 311). Fees are not interrelated merely because facts are intertwined. Rather, “it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.” *Navigant*, 508 F.3d at 298 (quoting *Chapa*, 212 S.W.3d at 313–14). See *Transcon. Realty Inv’rs, Inc. v. McGuire, Craddock, Strother & Hale, P.C.*, No. 05-09-00884-CV, 2011 WL 1493985, at \*5 (Tex. App.—Dallas Apr. 20, 2011, pet. denied) (law firm not required to segregate where an attorney’s fees for a breach of contract claim and a malpractice counterclaim depended “upon many of the same essential facts and evidence”). If a party fails to segregate, the district court may award a percentage of fees rather than denying recovery of fees completely. *Navigant*, 508 F.3d at 298.

B. The Claims Are So Interrelated That the Majority of the Time and Fees Cannot Be Segregated.

1. *Attorney’s Fees Are Recoverable for Trademark Infringement.*

Under the Lanham Act, “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” 15 U.S.C. § 1117(a). “An exceptional case is one where the violative acts can be characterized as ‘malicious,’ ‘fraudulent,’ ‘deliberate,’ or ‘willful.’” *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1390 (5th Cir. 1996). “The prevailing party has the burden to demonstrate the exceptional nature of a case by clear and convincing evidence.” *Id.* “The necessary showing demands a high degree of culpability on the part of the infringer, for

example bad faith or fraud.” *Smack Apparel*, 550 F.3d at 491. “A district court normally should not find a case exceptional where the party presents what it in good faith believes may be a legitimate defense.” *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 66 (5th Cir. 1992).

Kryptek has provided direct evidence that Defendants’ website offered products described as “Kryptek Kronos.” [Dkt. # 1-12 (Ex. K)]. Defendants have not provided a good faith defense for using Kryptek’s trademark to sell camouflage goods. The court holds that Defendants’ infringement of Kryptek’s trademark was deliberate and willful and that Kryptek is entitled to attorney’s fees.

2. *Attorney’s Fees Are Recoverable for Copyright Infringement.*

The Copyright Act grants the district court discretion to award reasonable attorney’s fees to a prevailing party. 17 U.S.C. § 505. In the Fifth Circuit, “an award of attorney’s fees to the prevailing party in a copyright action is the rule rather than the exception and should be awarded routinely.” *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 588–89 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 592 (2015) (internal citations and quotations omitted). The Supreme Court has identified the following factors to guide the court’s discretion in awarding attorney’s fees for copyright infringement: “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1033 (1994).

An award of attorney’s fees is justified in this case based on consideration of the *Fogerty* factors and the Fifth Circuit’s “awarded routinely” mandate. The lawsuit was neither frivolous nor objectively unreasonable. Kryptek notified Defendants of their infringement on August 20, 2015 [Dkt. # 1-10 (Ex. I)], served Defendants on September 17 and 18, 2015 [Dkt. ## 5, 6], and

gave Defendants well over a month to file an Answer before seeking injunctive relief, and later a default. Allowing recovery of attorney's fees will advance considerations of compensation and deterrence consistent with the Copyright Act. Given these factors, an award of attorney's fees for copyright infringement is justified.

3. *The Claims for Design Patent Infringement and Trade Dress Infringement Need Not Be Segregated.*

For patent infringement, “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285. “[A]n ‘exceptional’ case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Octane Fitness, LLC v. ICON Health & Fitness*, 134 S. Ct. 1749, 1756 (2014). This determination is on a case-by-case basis, considering the totality of the circumstances. *Id.*

The only way in which this case stands out from others is that Defendants never responded. While a default judgment not typical in patent cases, it is not so deviant as to justify an award of attorney's fees as an “exceptional” case under § 285.

Nevertheless, with one exception, attorney's fees for design patent infringement can be recovered because these claims are sufficiently intertwined with the claims of copyright infringement. The same identical evidence—Defendant's infringing products—serves as the basis for both types of infringement claims. It follows that the same discrete services of comparing Kryptek's products to Defendants' products were performed for both types of claims. It is enough for Kryptek's attorneys to say, “I worked X total minutes going through Defendants' online catalogs identifying products that infringe our patterns.” Demanding segregation would require Kryptek's attorneys to somehow tabulate the amount of time they were subjectively thinking about each type of infringement while viewing each individual product. Under such

circumstances, segregation is not required and attorney's fees are recoverable for design patent infringement.

The same is true for attorney's fees recoverable for trade dress infringement. If Kryptek only alleged trade dress infringement, it could not recover because it is not a prevailing party with respect to those claims. But because essentially the same legal services were performed in identifying this sort of infringement as other types of infringement, the trade dress claims are sufficiently intertwined that segregation is unnecessary.

There is one charge directed exclusively to design patent infringement—a June 4, 2015 fee of \$2,212.50 for 7.5 hours of work at \$295.00/hr. [Dkt. # 15-2, at p. 13 of 31]. The description is: "Draft complaint against Salt Armour, including drafting patent design infringement allegations and inducing and contributory infringement claims." *Id.* A similar description for copyright infringement was entered for the prior day. *Id.* As the June 4, 2015 entry is directed exclusively to design patent infringement, Kryptek cannot recover for this amount. All other entries are sufficiently intertwined with the copyright and trademark claims that they can be recovered.

C. Analysis of Attorney's Fees Request

Kryptek has submitted invoices providing the number of hours and billing rates for three attorneys: Ms. Darlene Ghavimi (DG), Mr. Stewart Mesher (SM), and Mr. Thomas Warden (TW). [Dkt. # 15-2, at pp. 12–31]. Taken together, these invoices provide the following hours, billing rates, and total billing rates for this case:

| <b>Invoice<sup>4</sup></b> | <b>DG<br/>(hours)</b> | <b>DG<br/>(\$/hr)</b> | <b>DG<br/>(total \$)</b> | <b>SM<br/>(hours)</b> | <b>SM<br/>(\$/hr)</b> | <b>SM<br/>(total \$)</b> | <b>TW<br/>(hours)</b> | <b>TW<br/>(\$/hr)</b> | <b>TW<br/>(total \$)</b> |
|----------------------------|-----------------------|-----------------------|--------------------------|-----------------------|-----------------------|--------------------------|-----------------------|-----------------------|--------------------------|
| 320909                     | 27.2                  | \$295                 | \$8,024                  | 2                     | \$480                 | \$960                    |                       |                       |                          |
| 323142                     |                       |                       |                          | 1                     | \$480                 | \$480                    |                       |                       |                          |
| 324129                     | 8.7                   | \$320                 | \$2,784                  | 2                     | \$480                 | \$960                    |                       |                       |                          |
| 325700                     | 31.4                  | \$320                 | \$10,048                 | 5.5                   | \$480                 | \$2,640                  |                       |                       |                          |
| 328092                     | 20.8                  | \$320                 | \$6,656                  | 3.25                  | \$480                 | \$1,560                  |                       |                       |                          |
| 328788                     | 15.7                  | \$320                 | \$5,024                  | 7.25                  | \$480                 | \$3,480                  | 5.4                   | \$450                 | \$2,430                  |
| 12/13/15                   |                       |                       |                          | 1.75                  | \$480                 | \$840                    | 23                    | \$450                 | \$10,350                 |
| PX 25 <sup>5</sup>         | 56                    | \$320                 | \$17,920                 | 10                    | \$495                 | \$4,950                  |                       |                       |                          |
| <b>Totals:</b>             | 159.8                 |                       | \$50,456                 | 32.75                 |                       | \$15,870                 | 28.4                  |                       | \$12,780                 |

*1. Reasonable Number of Hours*

According to the Invoices, the three attorneys performed 220.95 hours of work. Based on total hours, 72% of this work was performed by Ms. Ghavemi, 15% was performed by Mr. Meshner, and 13% was performed by Mr. Warden. For the fees entered prior to the evidentiary hearing (through 12/13/15), Mr. Warden has provided an affidavit stating that he reviewed the hours and that the amount of time spent on this case was reasonable. [Dkt. # 15-2, at pp. 2–6]. For the attorney’s fees recorded in PX 25, Mr. Bailey testified that he is a Texas attorney and believes that the rates and times entered are reasonable for the type of work performed. The court agrees that this is a reasonable number of hours for a case alleging the infringement of four types of intellectual property (design patents, copyright, trademark, and trade dress), including three design patents and ten copyrighted works.

<sup>4</sup> The entries associated with each Invoice are reported on pages 14 (Invoice 320909), 17 (Invoice 323142), 19 (Invoice 324129), 23 (Invoice 325700), 26 (Invoice 328092), and 30 (Invoice 328788) of Dkt. # 15-2. The billing records for the “12/13/15” entry are a tally of the hours entered by each attorney before a formal invoice was entered. [Dkt. # 15-2, at p. 31].

<sup>5</sup> This invoice was presented during the evidentiary hearing as Plaintiff’s Exhibit 25. It represents the amount of attorney’s fees that Kryptek billed preparing for the evidentiary hearing.



2. *Billing Rate and Lodestar Amount*

Kryptek moves for \$79,106.00 in attorney's fees for the 220.95 hours of work performed by three attorneys at five different billing rates. Mr. Warden has included an affidavit stating that the hourly rates of the three attorneys involved in this litigation were reasonable. [Dkt. # 15-2, at p. 3, ¶ 10]. All three attorneys work for Conley Rose, a Texas law firm with offices in Plano, Austin, and Houston. Mr. Warden is a shareholder at Conley Rose and has been practicing intellectual property law for eighteen years. He charged an hourly rate of \$450/hour. Ms. Ghavemi is an attorney at Conley Rose with ten years of experience and initially charged an hourly rate of \$295/hour, but later \$320/hour. Mr. Mesher is the chair of the litigation group at Conley Rose and has twenty years of experience as a lawyer. He charged hourly rates of \$480/hour and \$495/hour.

Mr. Warden has provided the 2013 AIPLA Report of Economic Survey ("Survey") as further proof of the reasonableness of the billing rates charged by the three attorneys. [Survey, Dkt. # 15-2, at pp. 8–10]. According to the Survey, the nationwide average billing rate for a partner with 15–24 years of experience is \$481/hour. In Texas, the average rate for all partners is \$546/hour. Given these values, the rates of \$450/hour, \$480/hour, and \$495/hour charged by Mr. Mesher and Mr. Warden are reasonable.

Also according to the Survey, the nationwide average billing rate for an associate attorney with 10–14 years of experience is \$419/hour. [Survey, Dkt. # 15-2, at pp. 8–10]. In Texas, the average rate for all associates is \$391/hour. Given these values, the rates of \$295/hour and \$320/hour charged by Ms. Ghavemi are reasonable.

Because the billing rates are reasonable, no further reduction in the lodestar amount is justified.

3. *No Lodestar Adjustment Based on Johnson Factors.*

Kryptek does not directly address the *Johnson* factors. Its indirect references to several *Johnson* factors do not justify further adjustment of the Lodestar amount. The time and labor required for litigation (factor 1) described in Mr. Warden's affidavit and the invoices is reasonable and does not support further adjustment. The fact that the case was decided on default judgment weighs against adjusting the Lodestar amount based on complexity of the issues (factor 2) or skill required (factor 3). The attorneys' customary fees (factor 5) do not justify further adjustment. Kryptek's attorneys were successful on their claims, but their success was not so impressive as to justify a further increase in the Lodestar amount (factor 8). While the attorneys are clearly experienced (factor 9), they are not so experienced as to justify a further increase. There is also no basis to believe that adjustment is warranted based on the undesirability of the case (factor 10).

Kryptek provides no argument as to whether the attorneys had to refuse other work to litigate the case (factor 4), whether the fee was fixed or contingent (factor 6), whether the client or case circumstances imposed any time constraints (factor 7), the type of attorney-client relationship and whether the relationship was longstanding (factor 11), and awards made in similar cases (factor 12).

Kryptek has provided no basis for further adjustment of the lodestar amount based on the *Johnson* factors. As already noted, the court will adjust the Lodstar amount by \$2,212.50, based on an entry related exclusively to a non-recoverable fee for design patent infringement. Kryptek is entitled to \$75,893.50 in attorney's fees.

**V. Costs**

A court may award costs to prevailing parties under Federal Rule of Civil Procedure 54(d). Pursuant to 28 U.S.C. § 1920, a court may tax the following as costs:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in this case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation in services under section 1828 of this title.

28 U.S.C. § 1920. A district court is permitted to decline to award costs listed in the statute but may not award costs omitted from the statute. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–42 (1987). “Without specific objections, [a party’s claimed] costs are presumed valid.” *A & J Elec. Cable Corp. v. Emerson Network Power, Inc.*, No. H-10-2361, 2013 WL 1290938, at \*2 (S.D. Tex. Mar. 26, 2013).

Kryptek’s first request is a \$400.00 fee of the clerk, which is recoverable under § 1920(1).

Kryptek also seeks a \$175.98 cost under § 1920(3) for the attendance of Mr. Bailey at the hearing. Section 1920(3) is to be read in conjunction with 28 U.S.C. § 1821. *Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64 (5th Cir. 1994). Texas district courts have allowed corporate representatives who testify as witnesses to recover statutory attendance fees and subsistence allowances for the days the representatives testify. *Crevier-Gerukos v. Eisai, Inc.*, No. CIV.A. H-11-0434, 2014 WL 108730, at \*5 (S.D. Tex. Jan. 9, 2014). In one case, the Fifth Circuit held that a corporate representative designated as a witness by both parties but not called to testify could recover a subsistence allowance at the per diem rate authorized by statute and travel expenses. *United Teacher Assocs. Ins. v. Union Labor Life Ins.*, 414 F.3d 558, 574–75 (5th Cir. 2005).

Since Mr. Bailey testified as a witness at the hearing, recovery of costs under § 1920(3) is not prohibited merely because he is also a corporate representative of Kryptek.

The \$175.98 cost is based on a \$40.00 attendance fee, a \$89.00 subsistence allowance, and \$46.98 for 174 miles traveled. The \$40.00 fee is recoverable under § 1821(b). Given that the hearing occurred relatively early in the morning, it was wise for Mr. Bailey to stay overnight and not risk the delays of an early-morning commute, so his requested subsistence allowance of \$89.00, which is equal to the standard per diem rate in Texas, is recoverable under § 1821(d)(1)–(2). Recovery of \$46.98 for the 174 miles spent traveling between Houston and Beaumont is consistent with the government reimbursement rate for privately owned vehicles and recoverable under § 1821(c)(2).

Kryptek is entitled to recover costs in the amount of \$575.98.

## **VI. Conclusion**

It is therefore ORDERED that Kryptek's request for reconsideration is GRANTED.

It is further ORDERED that Kryptek is entitled to default judgment on its claim of copyright infringement.

It is further ORDERED that Kryptek is entitled to \$1,075,000.00 in damages plus pre-judgment interest on said amount at the rate of 5.00% per annum, simple interest from September 9, 2015 to the filing of this judgment.

It is further ORDERED that Kryptek is entitled to \$76,893.50 in attorney's fees and \$575.98 in costs.

It is further ORDERED that all sums awarded shall include post-judgment interest calculated pursuant to 28 U.S.C. § 1961 from the date of the judgment, until the judgment is satisfied.

It is further ORDERED that the clerk bill costs in the amount of \$575.98.

So **ORDERED** and **SIGNED** this **28** day of **March, 2016**.

A handwritten signature in cursive script, appearing to read "Ron Clark".

---

Ron Clark, United States District Judge