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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an Individual,  
Plaintiff,

vs.

STORIX, INC., a California  
Corporation,

Defendants.

Case No. 14-Cv-1873 H (BLM)

**PLAINTIFF'S SUPPLEMENTAL  
BRIEF REGARDING THE UNITED  
STATES SUPREME COURT  
DECISION IN *KIRTSAENG V.  
JOHN WILEY & SONS, INC.'S  
EFFECT ON STORIX, INC.'S  
MOTION FOR ATTORNEYS' FEES  
(DKT. NO. 165)***

STORIX, INC., a California  
Corporation,

Counter-Claimant,

vs.

ANTHONY JOHNSON, an individual,  
Counter-Defendant

Judge: Hon. Marilyn L. Huff  
Magistrate: Hon. Barbara Lynn Major  
Complaint Filed: August 8, 2014  
Trial Date: December 8, 2015



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1 Plaintiff Johnson respectfully submits this Supplemental Brief regarding the  
 2 United States Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons, Inc.*'s  
 3 effect on Storix's Motion for Attorneys' Fees (Dkt. No. 165).

4 In that decision, the Supreme Court put the substantial weight afforded  
 5 objective reasonableness into clear focus. The only in-Circuit court to have applied  
 6 this holding to-date, did not hesitate to deny fees where the prevailing party had  
 7 engaged in poor litigation conduct. *Countryman Nev., LLC v. Doe*-73.164.181.226,  
 8 2016 U.S. Dist. LEXIS 79172 (D. Or. June 17, 2016). Mr. Johnson's situation shares  
 9 both of these key features – objective reasonableness, and poor litigation conduct by  
 10 the party seeking fees – as well as all of the other factors favoring him that were  
 11 addressed in the initial briefing (and some of which are summarized briefly below).  
 12 Thus, *Kirtsaeng* has put into focus the unmistakable result that should attend on  
 13 Storix's motion – a denial of Storix's fees motion.

#### 14 **I. THE SUPREME COURT STANDARD FOR AWARDED FEES IN A** 15 **COPYRIGHT CASE**

16 On June 16, 2016, the Supreme Court resolved the following question:  
 17 “whether a court...should give substantial weight to the objective reasonableness of  
 18 the losing party's position.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 195 L. Ed. 2d 368,  
 19 2016 U.S. LEXIS 3922, \*5 (2016). The Court's answer “...is yes...[b]ut the court  
 20 must also give due consideration to all other circumstances relevant to granting  
 21 fees...” *Id.* These factors were already briefed and discussed by Johnson in its initial  
 22 Opposition to Storix's motion.<sup>1</sup>

23 The Supreme Court clarified that “[t]he objective-reasonableness approach...

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24  
 25 <sup>1</sup> The factors include “(1) the degree of success obtained; (2) frivolousness; (3)  
 26 motivation; (4) the objective unreasonableness of the losing party's factual and legal  
 27 arguments; and (5) the need, in particular circumstances, to advance considerations of  
 28 compensation and deterrence.” *Entm't Research Grp., Inc. v. Genesis Creative Grp.,*  
*Inc.*, 122 F.3d 1211, 1229 (9th Cir. 1997) (internal citations omitted) (citing *Fogerty*  
*v. Fantasy, Inc.*, 510 U.S. 517 (1994)).



encourages parties with strong legal positions to stand on their rights.” *Kirtsaeng*, 2016 U.S. LEXIS 3922 at \*13. However, “[a]lthough objective reasonableness carries significant weight, courts must view all the circumstances of a case on their own terms, in light of the Copyright Act’s essential goals.” *Id.* at \*21. Indeed, the Supreme Court told courts they have wide discretion to “...deny fees even though the losing party made unreasonable [arguments or positions].” *Id.*

## II. ***KIR TSAENG* STRENGTHENS JOHNSON’S POSITION WHEN CONSIDERING HIS OBJECTIVE REASONABLENESS**

### A. **The Proper Application of the Supreme Court’s *Kirtsaeng* Opinion**

This Court must decide how to appropriately apply the Supreme Court’s unanimous mandate that objective reasonableness be given “substantial weight,” despite the presence of many other factors for consideration. *Kirtsaeng*, 2016 U.S. LEXIS 3922 at \*4. Fortunately, this standard has been developed elsewhere.

In other contexts where courts are instructed to provide “substantial weight” to a factor, a clear showing of the remaining factors is required in order to overcome the substantially weighted factor and warrant a contrary result. For instance, in the transfer of venue context, courts have balanced several factor tests by giving the Plaintiff’s forum selection “substantial weight...which can only be overcome by a ‘clear showing’ by Defendants that the alternative forum is more convenient.” *Brenner v. CONRAIL*, 2009 U.S. Dist. LEXIS 77014, \*12 (E.D. Pa. Aug. 26, 2009) (quoting *Richards v. Consolidated Rail Corp.*, 1994 U.S. Dist. LEXIS 14985 \*2 (E.D. Pa. Oct. 18, 1994)) (in turn quoting *Hohler v. Pa. R.R.*, 140 F.Supp. 487, 489 (E.D. Pa. 1956))). Put another way: “Indeed, a plaintiff’s choice of forum should rarely be disturbed unless the balance weighs strongly in the defendant’s favor.” *Clear C. Int’l, Inc. v. Turner Constr. Co.*, 2005 U.S. Dist. LEXIS 18855, 2-3 (N.D. Ill. Aug. 30, 2005) (Emphasis added); *see also Canadian Kennel Club v. Continental Kennel Club*, 1997 U.S. Dist. LEXIS 9159 \*4 (S.D.N.Y. June 23, 1997) (same; substantial weight



not overcome absent “*clear and convincing showing*” or showing that on-balance the factors “*weigh[] heavily* in favor”) (Emphasis added).

Transposed to the context of attorneys’ fees under the Copyright Act and *Fogerty* factors, this means that if the Court finds that the unsuccessful party’s case was objectively reasonable, the Court should only award fees if it finds a clear showing has been made that the remaining factors somehow warrant fees. And even then, such an award would still be discretionary.

Applied to this case, and as further explained below, because Johnson’s legal position was objectively reasonable, fees should not be shifted absent a very strong showing favoring Storix on the remaining *Fogerty* factors, which Storix cannot demonstrate (indeed, those factors favor Johnson). The objective reasonableness factor thus decisively tips the scales in favor of denying fees.

**B. The Denial of Fees Based on Objective Reasonableness Should Become All the More Common Post-*Kirtsaeng***

While courts in this Circuit often denied fees to the prevailing party where objective reasonableness was present pre-*Kirtsaeng*, it should happen with all the more frequency in light of the “substantial weight” standard now uniformly applicable after *Kirtsaeng*.

Although hardly a large enough sample size, the one post-*Kirtsaeng* case in this Circuit sided with the many pre-*Kirtsaeng* cases to have denied fees to a prevailing party in the presence of objective reasonableness. *See, e.g. Countryman* 2016 U.S. Dist. LEXIS 79172; *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946 (9th Cir. 2012) (reversed on other grounds); *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2001).

In *Countryman*, the court denied fees to the prevailing party after considering the *Kirtsaeng* decision. There the court denied fees based on Plaintiffs’ counsel’s poor litigation conduct. Litigation that needlessly increases the expense of all parties



1 “...violates the principles underlying Rule 1 of the Federal Rules of Civil Procedure,  
 2 which provides that these rules should be ‘employed by the court and the parties to  
 3 secure the just, speedy, and inexpensive determination of every action and  
 4 proceeding.’” *Countryman*, 2016 U.S. 79172, at \*22. That type of conduct does not  
 5 further the objectives of the Copyright Act. *Id.* Indeed, “Litigation conduct that  
 6 needlessly increases the expense of resolving copyright disputes neither encourages  
 7 innovation nor appropriately rewards an author’s creation.” *Id.* at \*23.

8 Even before *Kirtsaeng*, in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d  
 9 946 (9th Cir. 2012) (reversed on other grounds), the district court denied the  
 10 prevailing defendant’s fee motion, even though it granted the defendant’s summary  
 11 judgment motion on laches. *Id.* at 1151. Many of the *Fogerty* factors favored the  
 12 plaintiff, and the case did not turn on issues of infringement (e.g. copying). Instead, it  
 13 turned on the plaintiff’s right to assert her claims in the face of a delay of many years  
 14 – a delay that came because she had only recently learned that caselaw favored her  
 15 claim to reversionary rights in the copyright. *Id.* The Court agreed she had a  
 16 reasonable belief that she could overcome the laches bar, given it was less clear cut  
 17 than in the closest Ninth Circuit case. *Id.* To deter others from seeking to vindicate  
 18 their rights in such situations, but facing issues involving many variables, would not  
 19 “further the policies of the Copyright Act.” *Id.* (quoting and affirming district court);  
 20 *see also Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham,*  
 21 *Inc.*, 259 F.3d 1186 (9th Cir. 2001) (affirming denial of fees to prevailing plaintiff  
 22 despite judgment of infringement and substantial statutory damages).

### 23 C. Fees Should Be Denied Here in View of *Kirtsaeng*

#### 24 1. Johnson’s Reasonable Litigation Position Weighs Most 25 Heavily Toward a Denial of Fees

26 Here, Johnson’s claims are well based in facts and law and are objectively  
 27 reasonable. Stated in the slightly different terms of frivolity, frivolous claims are  
 28



1 “*baseless*” and involve “*fantastic or delusional scenarios.*” *Perfect 10, Inc. v.*  
 2 *Giganews, Inc.*, 2015 U.S. Dist. LEXIS 54063, \*20 (C.D. Cal. Mar. 24, 2015)  
 3 (emphasis added) (“courts have not articulated precisely how [the objective  
 4 reasonableness] factor differs from the question of whether a claim was ‘frivolous.’”) (citing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1120 (9th Cir. 2007)  
 5 (discussing the two factors without differentiating between them)); *see also Gilbert v.*  
 6 *New Line Prods.*, 2010 U.S. Dist. LEXIS 141518, \*11 (C.D. Cal. Dec. 6, 2010)  
 7 (finding the analysis under the two factors to be the same.). Johnson’s claims are  
 8 anything but frivolous or unreasonable.<sup>2</sup>

10 First, the Court has already carefully considered this issue and determined that  
 11 Johnson’s claims were not frivolous. During the hearing on this motion, the Court  
 12 noted “...there was a triable issue of fact. *So it wasn’t frivolous.*” Declaration of  
 13 Andrew Skale (“Skale Decl.”) ¶ 2, Exh. 1 (emphasis added); *see also Id.*, Exh. 2 (The  
 14 Court added “...is there a frivolous legal argument that they’re advancing, I at least  
 15 thought on summary judgment, no, it’s not frivolous.”). Regardless of whether  
 16 frivolity and objectively unreasonable are the same, the Court’s findings show that  
 17 Johnson could not have known from the outset its chances were slim to none. Thus,  
 18 the Court has already determined that the most important factor to be analyzed favors  
 19 Johnson.

20 Second, Johnson’s case survived Storix’s summary judgment motion and

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22 <sup>2</sup> Notwithstanding the district court in *Perfect 10 v. Giganews* had found other courts  
 23 – including the 9th Circuit – to not have distinguished between frivolity and objective  
 24 unreasonableness, there the district court went on to note it believed the standard for  
 25 objective unreasonableness was slightly lower than for frivolity. 2015 U.S. Dist.  
 26 LEXIS 54063, at \*32-33 (saying objective unreasonableness was “where the party  
 27 advancing it should have known from the outset that its chances of success in this  
 28 case were slim to none”) (citing *SOFA Entertainment, Inc. v. Dodger Prods., Inc.*,  
 709 F.3d 1273, 1280 (9th Cir. 2013) (denying fees because the party advancing the  
 case, from a previous litigation, “should have known from the outset that its chances  
 of success in this case were slim to none”). Even using this standard, however,  
 Johnson’s case was not objectively unreasonable.



1 Storix's motion for judgment as a matter of law. Courts looking at this very same  
2 situation have held the case to be objectively reasonable. In determining "whether  
3 the claims were frivolous, **unreasonable**, or groundless...a court cannot properly  
4 consider a claim to be frivolous on its face if it finds that the plaintiff must be allowed  
5 to litigate the claim...[n]or may a claim properly be deemed groundless where the  
6 plaintiff has made a sufficient evidentiary showing to forestall summary judgment  
7 and has presented sufficient evidence at trial to prevent the entry of judgment against  
8 him as a matter of law." *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 765, 770-71 (2d  
9 Cir. 1998) (emphasis added). That the jury finds for the other party does not "permit  
10 the *post hoc* conclusion that plaintiffs' claims were frivolous, groundless, or  
11 **unreasonable**." *Id.* (affirming denial of fee award) (emphasis added).

12 Accordingly, because Storix lost both its summary judgment motion and its  
13 motion for entry of judgment as a matter of law, the case must be found to be  
14 objectively reasonable, regardless of what the jury ultimately found. *Id.* at 770  
15 ("Certain types of judicial rulings strongly indicate that a plaintiff's claim should not  
16 be deemed frivolous, groundless, or unreasonable. For example, a court cannot  
17 properly consider a claim to be frivolous on its face if it finds that the plaintiff must  
18 be allowed to litigate the claim.").

19 Third, Johnson's case was objectively reasonable. Johnson believed (and *still*  
20 believes) that he is the owner of the copyrighted software, that he never transferred  
21 that software to Storix, and that a written transfer agreement (as required by Section  
22 204 of the Copyright Act) does not exist. Moreover, Johnson's actions further the  
23 purposes of the Copyright Act -- he is an inventor encouraged to protect his works  
24 through the legal system. As detailed in Johnson's Opposition to Storix's fee motion,  
25 this was an objectively reasonable case. Dkt. No. 180 at 4-6; 8-10. The fact that the  
26 Court found triable issues of fact and that there is substantial debate about whether or  
27 not there was a sufficient writing evidencing a transfer of copyright ownership,  
28



1 proves that Johnson did not know from the outset that his chances of success were  
2 slim to none.

3 The Copyright Act protects against accidental transfers with its strict writing  
4 requirement. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989)  
5 (Congress’s “paramount goal in revising the 1976 Act [was] enhancing predictability  
6 and certainty of copyright ownership.”); *Effects Assocs. v. Cohen*, 908 F.2d 555, 557  
7 (9th Cir. 1990) (“The rule is really quite simple: If the copyright holder agrees to  
8 transfer ownership to another party, that party must get the copyright holder to sign a  
9 piece of paper saying so.”). To this day, Storix cannot (because a §204 compliant  
10 writing does not exist) point to the terms of a valid transfer of copyright ownership  
11 from Johnson to Storix. See *Cnty. for Creative Non-Violence*, 490 U.S. at 749  
12 (Congress’ “paramount goal in revising the 1976 Act [was] enhancing predictability  
13 and certainty of copyright ownership.”).<sup>3</sup> The facts and law simply do not lend  
14 themselves to Storix’s post-game commentary of an easy win.

15 Johnson’s litigation position was non-frivolous, legally sound, and objectively  
16 reasonable. The Court already found as such. Thus, this factor should weigh heavily  
17 in the Court’s denial of Storix’s motion for attorneys’ fees.

## 18 2. Under *Kirtsaeng*, the Remaining *Fogerty* Factors Confirm 19 Storix’s Fees should be Denied

### 20 a. Storix’s Gamesmanship is a Pivotal Consideration 21 Warranting a Denial of Fees

22 Assuming Storix is the prevailing party in this case, the totality of the  
23 circumstances in the instant case begs the Court to deny Storix’s fee motion. Like the  
24 prevailing party in *Countryman*, Storix has engaged in gamesmanship designed to

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25  
26 <sup>3</sup> The stray notation in the annual report (the writing Storix points to) does not state  
27 the terms of any transfer, nor has Storix ever articulated under what terms, or what  
28 consideration Johnson received, for any such transfer of ownership.



1 force Johnson to waste significant resources during the litigation. *Countryman*, 2016  
 2 U.S. 79172 at \*21-23 (Finding post- *Kirtsaeng* that litigation conduct by the  
 3 prevailing party bears on advancing the purposes of the Copyright Act, and totality of  
 4 the circumstances.). Storix should not be rewarded for doing so. Examples of  
 5 Storix’s gamesmanship, which significantly increased litigation costs, include:

- 6 • Creating a hard drive with 68 GB of data and a DVD with over 30MB of  
 7 financial data on August 10, 2015 but withholding its production to  
 8 Johnson until around 6:00 pm on September 18 (the Friday before the  
 9 Monday deposition of Storix’s financial expert Mr. Brian Bergmark) –  
 10 1719 pages, with each page containing 68 separate files. Dkt. No. 37-1  
 11 (Declaration of Gary L. Eastman in Support of Plaintiff’s Ex Parte  
 12 Motion to Continue Deadlines (“Eastman Decl.”) at ¶¶ 10-20).<sup>4</sup> Further  
 13 analysis showed that, even beyond withholding the hard drive from  
 14 production until the 11th hour, this hard drive was also corrupted. Dkt.  
 15 No. 37-1, ¶¶ 10-20).
- 16 • Not producing this financial data during fact discovery, but waiting until  
 17 after Johnson’s financial expert had conducted his analysis and created  
 18 his expert report. Dkt. No. 37-1, ¶¶ 15, 20.
- 19 • Forcing Plaintiff to seek relief from the Court to extend deposition dates  
 20 affected by Storix’s intentional withholding of this data, instead of  
 21 stipulating to an appropriate extension. Dkt. No. 37-1, ¶ 22.
- 22 • Producing 240,000 pages of discovery that were responsive to  
 23 outstanding discovery requests on May 29, 2015, the first day of  
 24 depositions of Storix’s client representatives. The depositions proceeded  
 25

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26 <sup>4</sup> Storix withheld its production for nearly six weeks before providing any notice that  
 27 the information even existed. Dkt. No. 37-1, at ¶ 15.



as scheduled despite Storix's attempt to hide these 240,000 pages of discovery (many being relevant) with a last-minute production. Dkt. No. 37-1, ¶ 21, Exh. 11.

- Storix repeatedly asking for discovery extensions, and in one instance, requested an extension of the Mandatory Settlement Conference alleging that the President of Storix, Mr. Huffman, could deal with a scheduling conflict concerning his divorce case -- in actuality, Storix was trying to buy time so that it could serve Johnson with a new state court case against him during the Mandatory Settlement Conference. Storix also requested Johnson to stipulate to a joint motion allowing Storix to depose Michelle St. Claire following the close of fact discovery, which Johnson agreed to do. In addition, Storix requested Johnson to stipulate to a joint motion allowing Storix to depose Anthony Johnson following the close of fact discovery, which Johnson agreed to do. Dkt. No. 37-1, ¶ 28. Meanwhile, Storix refused to stipulate to the one extension that Johnson requested. Dkt. No. 37-1, ¶ 22.
- Storix carelessly and inadvertently produced numerous documents, only to seek to recall such documents later (after Johnson had spent considerable time and money reviewing such documents) – especially because Storix has produced such a large volume of documents. Storix claimed it inadvertently produced 605 documents – including several thousand pages – forcing Johnson to invest in having to initially review and then carefully recall these documents. The documents produced were irrelevant to the case and even a cursory view of the documents before production would have precluded Storix from producing them. Storix only became aware of their inadvertent production when it was brought to their attention by Johnson during deposition. Declaration of



Gary Eastman in support of Plaintiff’s Supplemental Brief regarding the United States Supreme Court’s decision in *Kirtsaeng v. John Wiley & Sons, Inc*’s effect on Storix’s Motion for Attorneys’ Fees (Dkt. No. 165) (“Eastman 2nd Decl.”) ¶ 2, Exhs. 1-a, 1-b.

- Storix failed to respond to discovery by the statutory due date, and when Storix did serve discovery responses on Johnson, the responses were incomplete, evasive, and/or nonresponsive. Eastman 2nd Decl. ¶ 3, Exhs. 2-4.
- Storix forced Johnson to spend approximately \$150,000 on experts to prove the specific version of SBAdmin subject to copyright – only to not even present Storix’s own expert on the same topic (or even dispute the issue). Obviously, had Storix stipulated to these facts or informed Johnson that it was not using its expert on this matter or disputing the issue, Johnson would have saved considerable time and money. Eastman 2nd Decl., ¶ 4.
- Withholding the complete discovery concerning source code, instead waiting until after the close of fact discovery to produce the remaining code, such that Johnson’s initial analysis and opening expert reports were incomplete. Dkt. No. 37-1, ¶ 21, Exh. 11.
- Not producing the hard drive of software code until after the close of fact discovery and after the initially scheduled dates of expert depositions (well after expert reports). Dkt. No. 37-1, ¶¶ 10-20.

Storix’s gamesmanship was prevalent throughout this litigation and increased litigation costs unnecessarily.<sup>5</sup> No party engaging in such conduct should be

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<sup>5</sup> Johnson’s attorney even contemporaneously documented the extensive “shenanigans” and gamesmanship engaged in by Storix in a detailed letter. Dkt. No. 37-12, Exh. 11.



1 rewarded with fees.

2 Storix's fee motion should be denied because granting it would be antithetical  
3 to the Copyright Act and would not further its purposes, just like in *Countryman*.  
4 2016 U.S. Dist. LEXIS 79172. Storix should not profit from its gamesmanship by  
5 shifting fees to Johnson. Granting Storix's motion for attorneys' fees would be in  
6 contravention of the Copyright Act and improper in light of *Kirtsaeng*.

7 **b. The Remaining *Fogarty* Factors Favor Johnson, and In No Way**  
8 **"Clearly" Outweighs his Objective Reasonableness**

9 Further, each of the remaining *Fogarty* factors also favor Johnson, and point to  
10 the impropriety of a fee award for Storix:

- 11 • ***The Degree of Success Obtained is Unknown.*** The degree of success is  
12 technically unknown. Johnson has appealed to the Ninth Circuit Court  
13 of Appeals because there is insufficient evidence of a written transfer  
14 agreement, and because the jury received erroneous instructions with  
15 regard to transfer of copyright ownership. While Storix maintains that  
16 because it initially prevailed with the jury that this factor weighs in its  
17 favor, the issue is on appeal. Hence, this factor has not been finally  
18 decided and Storix cannot be put in a position it is not yet entitled.  
19 Hence the factor is neutral.
- 20 • ***Johnson's Suit is Not Frivolous.*** As noted above, Courts do not  
21 distinguish this factor from the objectively reasonable factor. As the  
22 Court noted during the hearing (Skale Decl., Exhs. 1-2), Johnson's case  
23 is not frivolous. *See supra* Section II(C)(1).
- 24 • ***Johnson's Motivation for Litigating is Proper.*** Johnson is not a Goliath  
25 who tried to bury a David out of spite – quite the opposite. Johnson  
26 litigated to establish ownership of his life's work, SBAdmin – the  
27 software program he wrote, copyrighted, and built a company around –  
28



1 because Storix had steadfast refused to update the software, which  
 2 desperately needed it. He passionately and zealously advocated to  
 3 vindicate his ownership of the software he created so he could fix it. He  
 4 would not have had to have file suit had he not altruistically gifted shares  
 5 of Storix stock to his employees or the company had continued to  
 6 provide the necessary updates. Johnson's motivation is pure and it is  
 7 simple: to be recognized as the true owner of the software he  
 8 painstakingly created such that it could be updated.<sup>6</sup>

- 9 • ***The Need to Advance Considerations of Compensation and***  
 10 ***Deterrence.*** Johnson is an inventor attempting to protect his intellectual  
 11 property rights. The employees, who gratuitously received shares in his  
 12 company when Johnson faced a terminal illness, teamed up against him,  
 13 kicked him out of the company, and vigorously opposed Johnson at  
 14 every turn. There is no need to deter Johnson's behavior. An inventor  
 15 that believes his or her work is being misused should not be deterred  
 16 from litigating to save that work. There is no behavior to deter here.

17 Johnson is the largest single shareholder in Storix, owning 40% of the  
 18 company. The Copyright Act is not furthered by punishing Johnson for trying to  
 19 protect the very company he formed and owns – especially when Johnson presented a  
 20 case that was neither objectively unreasonable nor frivolous. Accordingly, besides  
 21 Johnson's case being objectively reasonable, there remaining factors do not clearly  
 22 outweigh that finding; fees should not be awarded here.

23 ///

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24  
 25 <sup>6</sup> Storix has continually maintained that Johnson filed suit out of revenge or a desire  
 26 to harm the company. Besides this not being true, there has been ***no*** evidence  
 27 presented of such intent. Johnson at all times wanted to help improve the software  
 28 and the company. Furthermore, as the largest shareholder in the company, it makes  
 no logical sense for him to want to harm the company.



1 **III. CONCLUSION**

2 The Supreme Court's clarification that the objective reasonableness of the non-  
3 prevailing party's position should be given substantial weight tips the scales even  
4 more strongly in favor of Johnson. Granting fees to Storix here would stifle the  
5 Copyright Act's goals and deter inventors (like Johnson) from innovating and  
6 protecting their works. Moreover here, Storix needlessly engaged in extensive  
7 gamesmanship and shenanigans, to waste Johnson's time and money. Based on  
8 Johnson's reasonable litigation position, and given Storix's unreasonable conduct, the  
9 Supreme Court's decision begs denial of Storix's fee motion.

10  
11 Dated: July 18, 2016

MINTZ LEVIN COHN FERRIS GLOVSKY  
AND POPEO PC

12  
13 By s/Andrew D. Skale  
Andrew D. Skale  
Anne-Marie D. Dao

14  
15 Attorneys for Plaintiff  
ANTHONY JOHNSON



**CERTIFICATE OF SERVICE**

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On July 18, 2016, I filed a copy of the following document:

**MEMORANDUM OF POINTS AND AUTHORITIES REGARDING THE UNITED STATES SUPREME COURT DECISION IN *KIRTSANG V. JOHN WILEY & SONS, INC.*'S EFFECT ON STORIX, INC.'S MOTION FOR ATTORNEYS' FEES (DKT. NO. 165)**

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Executed on July 18, 2016, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

By s/Andrew D. Skale  
Andrew D. Skale