

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMARK COMMUNICATIONS, INC. : CIVIL ACTION
 : :
 : :
 : :
 : :
HARRIS CORPORATION : NO. 95-2123

MEMORANDUM AND ORDER

BECHTLE, J.

MARCH 30, 1998

Presently before the court is Comark Communications, Inc.'s ("Comark") motion for attorneys' fees and costs and Harris Corporation's ("Harris") opposition thereto. For the reasons set forth below, Comark's motion will be granted.

I. BACKGROUND

This patent infringement case involved United States Patent Number 5,198,904 (the "patent"), held by Comark. That patent claims a system and method for an aural carrier corrector, a device designed to eliminate distortion of the aural signal caused by the visual signal in common amplification television transmitters.

On April 11, 1985, Comark commenced this action alleging that Harris had willfully infringed the patent by making and selling the Sigma line of transmitters in the United States beginning in 1993. Harris denied infringement and asserted that the patent was invalid because it lacked novelty, obviousness and specificity under 35 U.S.C. §§ 102, 103 & 112. Harris also set

forth two affirmative defenses relating to claim construction. Discovery began in July 1995 and continued through September 1996. Over 100,000 pages of documents were produced. A number of depositions had to be conducted in Europe. On October 18 and 21, 1996, the court held a Markman hearing.¹ On March 5, 1997, a jury trial commenced before this court. After 19 days of testimony, the case was submitted to the jury. On April 17, 1997, the jury returned a verdict finding that Harris had wilfully infringed Comark's patent. The jury awarded compensatory damages in the amount of \$7.7 million. On May 2, 1997, Harris filed a renewed motion for judgment as a matter of law and for a new trial. On the same day, Comark filed motions requesting pre-judgment interest, increased damages, a fees and a permanent injunction. The court denied Harris' motions and granted Comark's motions. On July 17, 1997, the court awarded Comark pre-judgment interest and double damages under 35 U.S.C. § 284. The court also granted Comark's motion for attorneys' fees and directed it to submit a petition detailing the fees and costs sought. On August 18, 1997, Comark submitted the instant petition, and on September 18, 1997, Harris filed its opposition.

Under 35 U.S.C. § 285, the court may award the prevailing party reasonable attorneys' fees and costs. Comark seeks \$2,600,857.00 for attorneys' fees and \$425,002.39 for costs, for

¹ The purpose of a Markman hearing is to construe disputed claims' terms. Markman v. Westview Inst., Inc., 517 U.S. 370 (1996).

a total of \$3,025,859.39. (Mem. Supp. Fees & Costs at 1.) Harris argues that the court should reduce the fees to an amount between \$800,000 and \$1.6 million for a number of reasons, including: excessive billing, excessive rates, inadequate documentation, overstaffing and unsubstantiated expenses.

II. DISCUSSION

A. Attorneys' Fees Under 35 U.S.C. § 285

A prevailing party seeking attorneys' fees must establish the reasonableness of its fee request by submitting evidence of the hours worked and the fee claimed. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). The party opposing the award may challenge the reasonableness of the request with an affidavit or a brief. That affidavit or brief must set forth the grounds for challenge with sufficient specificity to give the fee applicant notice. Id. In considering the motion and the adverse party's objections, the district court has wide discretion to modify the award. Id.

In order to arrive at the amount of the award, the court must multiply the number of hours spent on the litigation by the reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424,433 (1982). This product, known as the lodestar, "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." Id. The lodestar method is the proper method to use under 35 U.S.C. § 285 and is presumed to be the reasonable fee. Howes v. Medical Components, Inc., 761 F. Supp.

1193, 1195 (E.D. Pa. 1990). After the court has calculated the lodestar, it may adjust it up or down to account for other relevant considerations. Rode, 892 F.2d at 1183-84.

1. Hours

Comark retained four law firms to represent it in this matter: Hogan and Hartson, LLP ("Hogan & Hartson"), Rothwell, Figg, Ernst & Kurz, P.C. ("Rothwell"), Raynes, McCarty, Binder, Ross & Mundy (local counsel) and Cabinet Lambert (French counsel). However, Comark is seeking fees only for the work performed by the two lead firms, Hogan & Hartson and Rothwell.

Comark seeks fees for 11,815 hours of work performed by Hogan & Hartson's nine attorneys and legal staff.² They also seek fees for 1,535.65 hours of work performed by the Rothwell attorneys and legal assistants.³ Harris raises a number of objections to Comark's calculation of hours.

(a) Irrelevant entries

In Appendix A to its motion, Harris lists a number of tasks performed by Comark's legal staff that it believes are irrelevant to the present litigation and it requests that the court reduce the hours accordingly. After reviewing the entries cited by Harris, the court is satisfied that each entry is related to this litigation.

² The amount of fees attributed to this work is \$2,296,505. (Mem. Supp. Fees & Costs at 6.)

³ The amount of fees attributed to this work is \$304,352. (DeLuca Aff. ¶ 12.)

For example, on the first page of Appendix A, Harris alleges that Rothwell billed Comark for work on an unrelated case. Id. 15. The entry to which Harris refers reads: "Dun and Bradstreet searches regarding Comark, Harris and Sonlight." The mere mention of a non-party does not indicate that the work was not done for this case.

In the same appendix, Harris asks the court to reduce Comark's hours by the number of hours spent drafting, researching and editing a motion to compel discovery that was not filed. (Mem. Opp. Fees & Costs at 14 & Appendix A at 1-2). In support of its argument, Harris cites cases in which fees were denied for unsuccessful motions. A motion not filed is not necessarily unsuccessful. In this case, the circumstances rendered filing the motion unnecessary. The court will not deduct the hours spent on that motion. The other entries Harris refers to as irrelevant are also substantiated and the court will not reduce the hours on this ground.

(b) Inadequate records

In Appendix B to its motion, Harris asks the court to reduce the number of hours because Comark's records are inadequate. Harris cites a number of entries that it believes are insufficiently detailed. The court has reviewed the entries and disagrees with Harris.

For example, on the first page of Appendix B, Harris cites DeLuca's entries on June 30, 1995 and July 30, 1995, which simply state "docketing." This is an adequate

description.⁴ Harris also cites an entry on September 16, 1995 containing the description "docket check." Again, this entry is adequate because it contains all of the necessary information from which the court and Harris can determine the reason for the bill, and how it is related to this case. The other disputed entries, totaling sixty-one pages, are also adequate and the court will not reduce the hours.

(c) Excessive time and improper staffing

Harris also argues that both of Comark's lead firms charged for excessive hours. (Mem. Opp. Fees & Costs at 10.) In particular, Harris argues that the pre-complaint hours and charges were excessive and that the time spent preparing for the depositions and the Markman Hearing were excessive in light of the fact that the hearing and each deposition lasted less than two days. (Mem. Opp. Fees & Costs at 12-13.) Harris also argues that the 5,396.45 hours of trial preparation, trial work and post-trial briefing period work billed is excessive. Id. at 13. The court disagrees. This was a complex case involving specialized law. The records sufficiently detail the work done and the court finds that the number of hours spent were not excessive for litigation of this nature.

Harris also argues that the court should decrease the fees awarded because Hogan & Hartson bills in 15 minute increments and that practice inflates the number of hours. Id.

⁴ Harris does not argue that Comark did not perform the task on that date.

The court does not find Hogan & Hartson's billing practice improper or extraordinary and the court will not reduce the hours on that ground.

Harris also argues that Hogan & Hartson's staffing was excessive and top-heavy. Harris cites the fact that the first 163 hours billed and the first ten months of work were performed by highly paid partners. (Mem. Opp. Fees & Costs at 14.) The court does not find that this constituted overstaffing. To the contrary, in order to determine whether the case had merit and to plan litigation strategy, Hogan & Hartson was justified in delegating the preliminary investigation to skilled attorneys who could make that determination.

(d) Double billing and duplicative work

In Appendix D, Harris also argues that Comark was double-billed by its firms and that there was duplication of effort for which the number of hours should be reduced. The court disagrees.

For example, on page 26 of Appendix D, Harris cites Bentley Exhibit 14, which lists Newmann entries on both March 29 and March 30. These entries are on separate days and read: "Contact Comark customers; prepare privilege log; research regarding infringement of foreign sales" and "research regarding foreign sales," respectively. The court will not reduce the hours merely because one attorney worked two days in a row and part of that time was spent on the same issue. The court has reviewed all of the entries that Harris cites and, like the above

example, the court finds no merit in this argument. The court will not reduce the hours on this ground.

Harris also argues that Rothwell billed for duplicative, unnecessary tasks limited to "occasional and cursory review of correspondence, pleadings, and discovery papers." (Mem. Opp. Fees & Costs at 15.) Harris further alleges that Rothwell's time records reflect "no meaningful contribution to the litigation after the filing of the complaint" and asks the court to reduce the hours accordingly. Id. The court disagrees with Harris' characterization of Rothwell's contribution. Rothwell was hired for its expertise in intellectual property law. It is not unreasonable that it would review Hogan & Hartson documents or accompany a Hogan & Hartson attorney to a deposition at which issues within Rothwell's expertise might arise. The court will not reduce the hours on this ground.

(e) Inconsistent billing

In Appendix E, Harris lists entries recorded by different attorneys that it believes show inconsistent hours billed for the same tasks and asks the court to reduce the hours to account for these discrepancies. While there are differences in some of the billing records, there are a number of plausible and probable explanations for these differences. The attorneys could have different billing practices or the attorneys could have performed different tasks. For example, Harris cites a March 1, 1995 meeting attended by both Bentley and DeLuca, and notes the fact that DeLuca billed for half of an hour more than

Bentley. DeLuca may have had a longer meeting with one of the attendees or consulted with the client after the meeting ended. The court will not reduce the costs awarded based upon Harris' unsupported accusation that the attorneys did not perform the tasks for the duration of time recorded. The remaining entries Harris cites under Appendix E are similar to the above example and the court will not reduce the hours on this ground.

2. The Reasonable Rate

An attorney's reasonable hourly rate is to be calculated "according to the prevailing market rates in the relevant community." Rode, 892 F.2d at 1183. In complex litigation, the relevant community is the actual business location of the attorneys. Howes, 761 F. Supp. at 1195. The reasonableness of those rates can be further checked by a comparison with the fees charged by other attorneys who practice the same type of law in the same community. Howes, 761 F. Supp. at 1196-97. Harris argues that Hogan & Hartson's rates were exorbitant in light of the firm's inefficiency and lack of experience. (Mem. Opp. Fees & Costs at 1.)

Comark's lead firms were from the District of Columbia.⁵ Hogan & Hartson specializes in complex civil litigation and Rothwell specializes in patent infringement law.

⁵ Parties should be entitled to retain the most competent counsel available especially in highly complex litigation. Comark had a good reason to choose non-local counsel and the court will permit it to receive attorneys's fees at the District of Columbia rate. See Howes, 761 F. Supp. at 1196.

In 1996, the hourly rates for partners at firms specializing in complex litigation in the District of Columbia ranged between \$150 and \$550 per hour. The rate for associates was between \$90 and \$230 per hour. See City-by-City Sampler of Hourly Rates, Nat'l L.J., Dec. 2, 1996, at B12. The average rate for partners practicing intellectual property law was \$258 per hour, and the rate for associates was \$157 per hour. Report of Economic Survey 1997, at 50 (AIPLA 1997).

The rates and hours charged by Comark's attorneys are:

A. Lee Bentley (H&H partner)	\$225-260/hr	3082.50 hours
David A. Kikel (H&H partner)	\$285-310/hr	2718.25 hours
David J. Hensler (H& H partner)	\$310-320	27.50 hours
Stephen P. Hollman (H&H partner)	\$230/hr	11.00 hours
Sten Jensen (H&H associate)	\$135-195/hr	1185.50 hours
David Newmann (H&H associate)	\$135-195/hr	1010.50 hours
David V. Snyder (H&H associate)	\$150-170/hr	269.25 hours
Stephen G. Vaskov (H&H of counsel)	\$235/hr	63.25 hours
Ronald Wiltsie II (H&H associate)	\$225-235/hr	140.50 hours
Vincent M. DeLuca (RF partner)	\$219/hr	35.35 hours

((Bentley Aff. Ex. 26; DeLuca Aff. ¶ 13.) Given the expertise and experience of the attorneys, the court does not find any of the fees unreasonable.⁶

Harris also contends that the rates and hours charged for support staff was excessive. The total charged for Comark support staff was \$251,981.25 for 3,297 hours by seven assistants. Rothwell support staff billed 21.85 hours. Again, given the complexity of this case, the court does not find these figures unreasonable.

⁶ The resumes and relevant professional data of the attorneys can be found at Bentley Aff. Ex. 28.

3. The Lodestar

The court finds that the hours and rates submitted by Comark are reasonable. The rates of the different attorneys multiplied by the hours each spent working on this case results in a lodestar of \$2,600,857. While the court may adjust this figure, in this case it finds that the lodestar is an appropriate amount and it will not decrease the lodestar.⁷

B. Costs

Under 35 U.S.C. § 285, Comark is also entitled to reasonable costs. Only expenses ordinarily billed to the client may be recovered. See Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278, 283 (2nd Cir. 1987). Comark asserts that its attorneys incurred costs totaling \$425,002.39, which are broken down as follows:

Travel	\$157,060.71
Discovery Related Matters	\$23,335.91
Litigation Support	\$195,854.54
Communications	\$48,751.23

⁷ Harris also asks the court to reduce the total by a percentage to achieve "rough justice." (Mem. Opp. Fees & Costs at 5, 17.) Because the court finds that the figures presented are just, it will not reduce the total.

(Mem. Supp. Fees & Costs at 12-13.)⁸ Comark subtracted the amounts requested in the Bill of Costs to eliminate overlap. Id. Harris argues that the costs are generally excessive and unsubstantiated and asks the court to reduce the costs to comply with the average set forth by the AIPLA Survey. (Mem. Opp. Fees & Costs at 20.) The court finds that the records submitted are sufficiently detailed and the costs are reasonable.

As Harris acknowledges, "the circumstances of each patent case differ." Id. at 23. The court has before it records from which it has determined that the costs submitted were reasonably incurred with respect to this litigation, and it will not disallow actual reasonable costs because the "average case" does not involve the same costs. The court has reviewed the records submitted in support of Comark's costs and finds that the costs are reasonable. It will grant the costs in total.

C. Reduction of the Total Award

Harris also asks the court to reduce the entire award to comply with the American Intellectual Property Law Association ("AIPLA") Survey's general patent infringement litigation guidelines. That survey lists ranges for total litigation expenses, including fees and costs, based upon the "amount at risk" in the litigation. Harris asserts that the amount at risk in this case was between \$1-10 million, and that based upon the

⁸ Hogan & Hartson incurred \$414,224.30 of this total and Rothwell incurred \$10,778.09 of this total. See Bentley Aff. & DeLuca Aff.

AIPLA Survey, any award should not exceed \$1.5 million. (Mem. Opp. Fees & Costs at 21.) In its computation of the amount at risk, Harris does not appear to rely on the relevant AIPLA definition. The AIPLA defines "amount at risk" as the "difference between best possible and worst possible outcomes." See AIPLA 1997 Economic Survey, Question 47 B at 4. Comark estimates that the amount at risk exceeded \$50 million. The court finds that this figure is more accurate. The AIPLA Survey estimates total expenses in such an action should be just under \$3 million. Comark is asking for \$3,025,859.39.⁹ Because of the complexities of the case and the amount of work performed and skill of the attorneys involved, the court finds the amount submitted reasonable. The court will not reduce the award.

III. CONCLUSION

For the reasons set forth above, the court will grant Comark's motion for attorneys' fees and costs. An appropriate Order follows.

⁹ There is little information about the cases in the Survey from which the figures are derived. Each civil action is unique and, while surveys can be helpful, they are not a substitute for analyzing the reasonableness of the hours and rates in the actual case in question.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMARK COMMUNICATIONS, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
HARRIS CORPORATION	:	NO. 95-2123

ORDER

AND NOW, TO WIT, this day of March, 1998, upon consideration of Plaintiff Comark Communications, Inc.'s motion for attorneys' fees and costs and defendant Harris Corporation's opposition thereto, IT IS ORDERED that said motion is GRANTED.

Within forty-five (45) days from the date of this Order, Harris Corporation shall pay \$3,025,859.39 to Comark Communications, Inc., for attorneys' fees and costs related to this litigation.

LOUIS C. BECHTLE, J.