

Attys Paid By The Song, And 2nd Circ. Says That Sounds Fine

By Hailey Konnath

Law360 (March 13, 2019, 9:29 PM EDT) -- Attorneys representing a class of TouchTunes jukebox users in what a New York district court deemed "a nuisance case" over skipped songs in bars will collect attorney fees of 20 cents per each song redeemed by customers in the settlement, the Second Circuit ruled Wednesday.

Bar patron Michelle Cline sued the digital jukebox company in June 2014 after Montana bartenders skipped two of her TouchTunes songs — worth about 40 cents each at the time — using a remote control the company provides to venue personnel. In a 2017 settlement that a New York district court called "pretty close to ... worthless," TouchTunes agreed to email a putative class of users whose songs were skipped one song credit each.

The district court was "well within its discretion" when it awarded attorney fees based on the number of song credits actually redeemed by users in the settlement, a three-judge panel decided Wednesday, weighing in on the five-year-old suit that had irked the lower court. The panel rejected Cline's assertions that she and her attorneys deserved more, including an incentive award and reimbursement for copying, postage and travel costs.

"The district court did not exceed the reasonable bounds of its discretion in awarding fees based on song credits actually redeemed, rather than technically awarded under the settlement," the panel ruled Wednesday.

The Second Circuit cited the Class Actions Fairness Act of 2005, which says if class members recover coupons in a settlement, attorney fee awards should depend on how many coupons are actually redeemed.

Also, as part of the settlement, TouchTunes had clarified its terms of use, spelling out that bartenders or venue personnel could skip a song. Class counsel argued that it was entitled to higher fees after securing this injunctive relief, but the panel said the value of that relief "is questionable" to TouchTunes customers.

"Even before this lawsuit was initiated, the vendor's terms of use informed users that their songs might not play and stated that refunds would not be issued for unplayed songs 'under any circumstances,'" the Second Circuit said.

TouchTunes sold song plays for 40 cents per play in the summer of 2013, when Cline claimed bartenders at the Bozeman, Montana, bar Eagles Lodge skipped her selection of a song off the soundtrack for the 1996 crime action film "Set It Off" as well as an AC/DC song she selected, according to her complaint. At another Bozeman bar, Molly Brown's, bartenders skipped a song by the Marshall Tucker Band she'd picked. She deleted the app that fall, she said in her complaint.

Her suit against the jukebox company listed violations of New York General Business Law as well as breach of the duty of good faith and fair dealing and unjust enrichment. After two motions to dismiss were granted in part, only her New York General Business Law claim was left intact.

In October 2017, TouchTunes agreed to settle with a putative class of app users, according to court filings. About 166,000 users were identified by TouchTunes as having paid for a song that didn't end up playing fully. TouchTunes sent those users one song credit via email.

About 285,000 users fell into a subclass of users who made purchases before TouchTunes started keeping records of songs that didn't play all the way through. Those users could file a claim to get their song credits. Only 2,200 of those customers had filed claims as of the final approval hearing in May 2018, according to court records.

TouchTunes said it wouldn't object to an incentive award of \$2,000 to Cline for being class representative and counsel fees and expenses of up to \$100,000, the filings show. However, the district court did, citing the negligible dollar amount involved. If all potential class members redeemed their 40-cent song credits before they expire, the settlement would be worth \$75,000 total.

In a final approval hearing, the court denied the incentive award and said Cline could only be reimbursed for the \$400 it cost to file the lawsuit. It was during that hearing that the court expressed its annoyance with the case, calling it a "nuisance" and the settlement pretty much "worthless."

The court made no error in its ruling, the Second Circuit found Wednesday, particularly given the "minimal value" of the lawsuit and settlement.

Cline had also argued that "personal bias" affected the district court's decision, citing its statements on the suit's inconsequential value. But rulings are rarely enough to prove a judge's bias, the Second Circuit said, calling her assertion "baseless."

Representatives with TouchTunes and counsel for the parties didn't immediately return requests for comment Wednesday.

Judges Robert D. Sack, Reena Raggi and Susan L. Carney sat on the panel for the Second Circuit.

Cline is represented by Jeffrey Michael Norton of Newman Ferrara LLP.

TouchTunes is represented by Joseph R. Palmore, Jamie A. Levitt and Robert J. Baehr of Morrison & Foerster LLP.

The case is Cline et al. v. TouchTunes Music Corp., case number 18-01756, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Alex Lawson. Editing by Jay Jackson Jr.