



COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0240

February 13, 2025

Wendy Papula

CLAIMANT

v.

Celil Akgobek

RESPONDENT

FINAL DETERMINATION

This matter has been fully submitted by the parties. For the reasons that follow, the Copyright Claims Board (“Board”) finds in favor of Claimant Wendy Papula and awards her \$750 in statutory damages.

I. Procedural History

Claimant Wendy Papula (“Papula” or “Claimant”) filed her copyright infringement claim on July 17, 2023, and selected a smaller claims proceeding (“Claim”) (Dkt. 1). The Board found the Claim compliant, and on August 2, 2023, directed Claimant to serve Respondent Celil Akgobek (“Respondent” or “Akgobek”). (Dkt. 1). Akgobek filed his Response to the Claim on February 5, 2024. (Dkt. 12). Discovery closed on April 29, 2024. (Dkt. 17). The parties were directed to file their statements and evidence by May 21, 2024. *Id.* On May 22, 2024, Papula submitted a position statement (“Claimant’s Position Statement”) (Dkt. 28), an evidence list (Dkt. 22), and evidence (Dkt. 18-21, 23-27). Also on May 22, 2024, Akgobek submitted a position statement (“Respondent’s Position Statement”) (Dkt. 30), an evidence list and evidence (“Respondent Evidence”) (Dkt. 29).

Pursuant to 37 C.F.R. § 226.1, a Merits Conference was held on July 2, 2024. (Dkt. 34). At the Merits Conference, Papula and Akgobek testified. Merits Conference transcript (on file with the Board) (“Conference Tr.”). After the Merits Conference, the Board ordered the Respondent “to do a reasonable search for any confirmation email or receipt for the digital download purchase at issue.” Copyright Claims Board Docket Note (Dkt. 34). On July 20, 2024, the Respondent filed a sworn statement that affirmed he conducted a search and contacted Etsy, but was unable to produce a confirmation or receipt. Respondent’s Statement (Dkt. 35).

The Board issued a Proposed Statement of Facts on November 21, 2024 (“Proposed Facts”). (Dkt. 36). No objections to the Proposed Facts were submitted.

The case is now ready for final determination.

I. Factual History

For an understanding of the facts underlying this proceeding, the reader is referred to the Findings of Fact, attached to this determination.

II. Legal Analysis

A. Merits

To succeed on a claim for copyright infringement, a claimant must establish: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). At the Merits Conference, Claimant also testified that she and co-owner George Jones created an image titled “Liberal Tears Starbucks Parody” (the “Work”) in early 2017 that was inspired by the Starbucks logo in which the words “LIBERAL TEARS,” an image of a cartoon-like girl crying, who is wearing a hat associated with women’s marches, and two teardrops are substituted for the original elements in the Starbucks logo. Conference Tr. at 3:45-4:08; Exhibit A (Dkt. 24). Claimant submitted Certificate of Registration No. VA 0002100800 for the Work, which was effective as of June 23, 2017, and which states that the Work was first published on February 24, 2017. (Dkt. 32). A certificate of registration, if timely obtained, is prima facie evidence both that a copyright is valid, and that the registrant owns the copyright. See 17 U.S.C. § 410(c); *See Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 988 (9th Cir. 2017) (citing *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998)). Based on the foregoing, it is clear that Papula owns the Work and thus, the Board need only consider whether Akgobek infringed the Work.

In the absence of direct evidence, copying is proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works. *See, e.g., Boisson v. Banian, Ltd.*, 273 F.3d 262, 267-68 (2d Cir. 2001); *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007); *Soc’y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colo.*, 689 F.3d 29, 48-49 (1st Cir. 2012); *Reader’s Digest Ass’n, Inc. v. Conservative Digest, Inc.*, 821 F.2d. 800, 806 (D.C. Cir. 1987). Copying can also be inferred without additional evidence of access if the allegedly infringed work and the allegedly infringing work are “so strikingly similar as to preclude the possibility of independent creation[.]” *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995) (internal quotation marks and citation omitted). *See*

also *Unicolors*, 853 F.3d at 985; *JCW Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 915 (7th Cir. 2007). In order to prove substantial similarity, the claimant must show that the allegedly infringing work is substantially similar to protectable elements of the infringed work. When “duplication is literal or verbatim, then clearly substantial similarity exists.” *Bell v. Wilmott Storage Services, LLC*, 12 F.4th 1065, 1074 (9th Cir. 2021) (quoting 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A][1] (2019)). See also *Novelty Textile Mills v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 (2d Cir. 1977) (finding defendant’s work substantially similar to plaintiff’s work when the former, “to our ‘lay’ eyes, is almost identical”). Papula has demonstrated that, without her consent, Akgobek reproduced and publicly displayed an almost identical copy¹ of the Work on t-shirts on Etsy. Claimant’s Position Statement at 1; Compare Claim Exhibit A with Claim Exhibit D. Respondent does not contest the fact that he used the Work on t-shirts but alleges that he thought that he legally obtained a copy of the Work as discussed more fully below.

B. Defenses

Akgobek asserts that he purchased a license to use the Work on Etsy as a defense to Papula’s claim of copyright infringement. Respondent’s Position Statement at 1; Conference Tr. at 1:20:13-01:22:46; 1:33:091:33:29.

In copyright disputes, regardless of whether the claimant can prove the elements of infringement, “the existence of a license authorizing the use of copyrighted material is an affirmative defense to an allegation of infringement.” *Baisden v. I’m Ready Prods.*, 693 F.3d 491, 499 (5th Cir. 2012). See also *Keane Dealer Services, Inc. v. Harts*, 968 F. Supp. 944, 947 (S.D.N.Y. 1997) (citing *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984)). The burden of proof is on the respondent to prove the existence and validity of such license, whether it is exclusive or non-exclusive. *Baisden*, 693 F.3d at 499. As such, the respondent cannot rely on this defense when the license is facially invalid, or they otherwise fail to establish compliance with license requirements. See *Talavera v. Glob. Payments, Inc.*, 670 F. Supp. 3d 1074, 1099-1100 (S.D. Cal. 2023) (holding that the defendants could not assert their software license as a defense to a claim of infringement because it had unequivocally expired).

Here, Respondent has not submitted sufficient evidence to establish the existence of a valid license. While

¹ Slight differences can be seen between the Work and the design on Respondent’s t-shirts such a pin on the hat of the girl in the Work that does not appear in the t-shirt design but to lay eyes the two works appear to be almost identical.

Respondent alleges that he purchased a downloadable file with the “Liberal Tears Parody” design from the Etsy store “TheHogansArts” for \$2.20, which he says included a “commercial license” for the design, he claims to no longer have a copy of the license and he could provide no other details about it. Conference Tr. at 1:21:34-1:23:03; 1:25:15-1:26:45; Respondent’s Interrogatory Responses, submitted as Claimant Evidence, Exhibit H at No. 2 and 4 (Dkt. 27). Respondent also tried to pass off a May 24, 2023, email from Etsy as a “Receipt screenshot showing respondents purchase of the design from Etsy” to prove his alleged purchase of the graphic from “TheHogansArts.” Respondent Evidence List at 1 (Dkt. 29). He states, “... a receipt showing my purchase of the design from Etsy (Exhibit F) demonstrates that I bought the design from a seller on Etsy without any reasonable suspicion that it could have belonged to another party.”² However, that receipt shows the opposite. Indeed, the May 24, 2023, email, titled “An update on your recent order,” states that the purchase of the design “was unable to be completed,” and is clearly not a receipt for his purchase of the design and certainly not for a license. Respondent Evidence, Exhibit F; Conference Tr. at 1:20:13-1:22:51. Although he claims to have actually purchased the design at a later time, he did not submit as evidence a confirmation or receipt of purchase or license for use of the Work. Conference Tr. at 1:22:11-1:22:21. Further, Respondent’s testimony that Etsy does not send such confirmation of purchases or receipts to customers (even as he attempts to use an inadequate exhibit as just such a receipt) seriously undermines Respondent’s credibility. Conference Tr. at 1:31:18-1:31:24.

It appears highly unlikely that Respondent actually purchased a license, but even if he did, such a license would not insulate Respondent from liability here. It is clear that “TheHoganArts” did not have authorization from Papula to license the design, and therefore, had no right to license any rights in the design to Respondent. *See In re Patient Educ. Media, Inc.*, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997) (citing *Landau v. Cosmetic & Reconstructive Surgery Ctr., Inc.*, 158 F.R.D. 117, 119 (N.D. Ill. 199) and 17 U.S.C. § 106 (“the owner of [the] copyright ... has the exclusive rights to do *and*

² Although Akgobek claims that he bought the design without any reason to suspect it was not valid, he did not take reasonable steps to verify if the seller owned the rights to the design despite the fact that he was an experienced purchaser of designs for the t-shirts he sold. Response (Dkt. 12); Conference Tr. at 1:25:23-1:28:34. It does not appear that he searched Copyright Office records, where he would have found that the Work was registered, or any other records before using the design on t-shirts.

to authorize the designated uses of the copyrighted work.”) (emphasis in original)). The reasonable or good faith use of material by a licensee does not shield that licensee from a claim of infringement because intent is not an element of infringement. *See Major League Baseball Promotion Corp. v. Colour-Tex, Inc.*, 729 F. Supp. at 1035, 1042 (D.N.J. 1990); *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1113 (2d Cir. 1986) (“[R]eliance - justified or otherwise - is irrelevant in determining whether [defendant] infringed [plaintiff’s] copyrights.”). Even an innocent infringer is liable for infringement. Under § 501(a) intent or knowledge is not an element of infringement”).

Because Akgobek’s asserted defense is without merit, the Board finds for Papula on the issue of liability and moves to the question of damages.

IV. Damages

Papula requests statutory damages in the amount of \$5,000, which is the maximum the Board can award in a “smaller claims” proceeding. Claimant’s Position Statement at 1; 17 U.S.C. § 1506(z).

Courts have wide discretion to award statutory damages as long as they fall in the statutory range. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231–32 (1952); *Fitzgerald*, 807 F.2d at 1116; *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135, 143 (2d Cir. 2010). “[T]he court’s conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid. . . . Within [the statutory] limitations the court’s discretion and sense of justice are controlling[.]” *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919). *See also Alouf v. Expansion Products, Inc.*, 417 F.2d 767, 769 (2d Cir. 1969); *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (quoting *F.W. Woolworth*, 344 U.S. at 232).

Furthermore, various courts have explained that (regardless of willfulness or lack thereof) statutory damage awards should significantly exceed the amount of unpaid license fees because the award “should put infringers on notice that it costs less to obey the copyright laws than to violate them.” *Broadcast Music, Inc. v. DFK Entertainment, LLC*, No. 1:10-CV-1393 GLS/DRH, 2012 WL 893470, at *4 (N.D.N.Y. Mar. 15, 2012) (internal quotation marks and citation omitted). As the court noted in *Werner v. Evolve Media, LLC*, No. 2:18-CV-7188-VAP-SKx, 2020 WL 4012784, at *3 (C.D. Cal. June 22, 2020):

Such an approach is consistent with the Copyright Act’s purpose of deterring copyright infringement. Indeed, as the Supreme Court has held, “a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct.”

(quoting *F.W. Woolworth*, 344 U.S. at 233). See also *Philpot v. L.M. Commc’ns II of S.C., Inc.*, 343 F. Supp. 3d 694, 702–03 (E.D. Ky. 2018), *rev’d and remanded on other grounds*, *Philpot v. LM Commc’ns II of S.C.*, 776 F. App’x 906 (6th Cir. 2019) (“Merely awarding statutory damages in the amount of the profits reaped from a copyright infringement would do little to discourage infringers.”).

In deciding the appropriate amount of statutory damages to award, courts generally seek to establish a relationship between statutory damages and actual damages. See, e.g., *Atari Interactive, Inc. v. Redbubble, Inc.*, 546 F. Supp. 3d 883, 888 (N.D. Cal. 2021) (“A statutory damages award ‘must bear a plausible relationship to Plaintiff’s actual damages[.]’” (citation omitted); *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 670 F. Supp. 1133, 1140 (E.D.N.Y. 1987) (“Undoubtedly these [statutory] damages should bear some relation to the actual damages suffered[.]”); *Seoul Broad. Sys. Int’l v. Young Min Ro*, No. 1:09cv433, 2011 WL 3207024, at *8 (E.D. Va. July 27, 2011) (“After all, ‘when awarded, statutory damages should bear some relation to the actual damages suffered.’”) (citation omitted); *Aberle v. GP Clubs, LLC*, No. A-19-cv-1066-RP, 2020 WL 4035074, at *4 (W.D. Tex. July 17, 2020) (“[W]hile there ‘need not be a direct correlation between statutory damages and actual damages,’ it has generally been held that ‘the statutory award should bear some relation to actual damages suffered[.]’” (citation omitted); *Bly v. Banbury Books, Inc.*, 638 F. Supp. 983, 987 (E.D. Pa. 1986) (“[N]umerous courts have held that assessed statutory damages should bear some relation to the actual damages suffered.”) (citations omitted).

Actual damages are primarily measured by “the extent to which the market value of the copyrighted work at the time of the infringement has been injured or destroyed by the infringement.” *Fitzgerald*, 807 F.2d at 1118. To secure actual damages, a claimant typically establishes impairment of market value by demonstrating lost sales or other lost profits that would have been obtained from the sale or license of the infringed work but for the respondent’s infringement. See *Stevens Linen Associates v. Mastercraft Corp.*, 656 F.2d 11, 15 (2d Cir. 1981); *Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346, 356 (S.D.N.Y. 2003). Such amounts should be based on a “factual basis”

and not “undue speculation.” *On Davis v. The Gap, Inc.*, 246 F.3d 152, 163 (2d Cir. 2001).

The burden of proof as to damages is on the plaintiff and where that party fails to provide evidence as to lost revenues, there is little to persuade a court to award more than the minimum amount of statutory damages.

Oppenheimer v. Holt, No. 1:14-CV-000208-MR, 2015 WL 2062189, at *2 (W.D.N.C. May 4, 2015). The minimum award in the statutory range is \$750 per work infringed. 17 U.S.C. § 504(c)(1). While Papula testified that she sold t-shirts and other merchandise bearing the Work on several platforms beginning in 2017, she did not submit any records or documents showing sales of such merchandise, never mind anything to show losses of sales. Conference Tr. at 17:17; 32:12-32:44. Papula made the knowing choice to present no evidence of sales of the Work or any damages that she might have suffered because she did not want to reveal her business records to Respondent or to the public: “Obviously, there is not much of a financial award for this infringement and you [the Board] had noted that this information would be public and I’m just not willing to do that. I’m not interested in disclosing our business model out for others... it’s not information I’d like public.” *Id.* at 17:17; 32:12-32:44. Claimant testified that “at the time of infringement we only had two sizes of the design in stock in two colors...So he couldn’t have hurt our [t-shirt] sales on what he sold because we didn’t have it in stock.” *Id.* at 43:25-43:28. 28. Claimant also testified that she could not identify any monetary harm because “it is impossible to say how the infringement affected our sales.” *Id.* at 44:32-44:57.

Respondent’s sales also favor an award of a minimum amount of damages. Respondent testified that during the two-week period between May 25, 2023, and July 13, 2023, when he listed his t-shirts for sale (Conference Tr. at 1:32:56-1:37:34. 22), he sold only one t-shirt featuring the Work for \$17.49 and incurred a cost of \$4.00 for the t-shirt. Conference Tr. at 1:28:41-1:28:55; Respondent’s Position Statement at 1; Respondent’s Evidence, Exhibit E (Dkt. 29). After filing a counternotice in response to Claimant’s takedown notice but before Claimant filed the present Claim, Respondent voluntarily removed his live t-shirt listing on Etsy. Claimant Exhibit G (Dkt. 20); Conference Tr. at 1:34:34-1:34:58. During the Merits Conference, Respondent agreed to permanently delete his “Liberal Tears” listing (which still appears on Etsy although it is not live) and to rescind the counternotice he filed on July 17, 2024 (“July 17 Counternotice”). *Id.* at 2:04:00-2:05:39.

In deciding statutory damages, courts have looked at various nonexclusive factors, including: “(1) the expenses saved and the profits reaped; (2) the revenues lost by the plaintiff; (3) the value of the copyright; (4) the deterrent effect on others besides the defendant; (5) whether the defendant's conduct was innocent or willful; (6) whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced; and (7) the potential for discouraging the defendant.” *Mon Cheri Bridals*, 2021 WL 1222492, at *1 (quotations and citations omitted). Furthermore, in considering damages for a copyright infringement, courts are “guided by ‘what is just in the particular case, considering the nature of the copyright [and] the circumstances of the infringement[.]’” *Peer Int’l Corp. v. Pansa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (quoting *F.W. Woolworth*, , 344 U.S. at 232). While some of the factors courts often look at are not present here - or relate to willfulness, which is outside of the Board’s ability to address - the totality of the “circumstances of the infringement” justifies a minimum amount of statutory damages. In addition, the Board is authorized to “consider, as an additional factor in awarding statutory damages, whether the infringer has agreed to cease or mitigate the infringing activity.” 17 U.S.C. § 1504(1)(A)(IV).

Based on the non-existent record regarding damages that Papula has given the Board, the miniscule amount of profits earned by Akgobek resulting from the sale of the infringing product, and Respondent’s representation to the Board that he would permanently delete the infringing listing and rescind the July 17 Counternotice, the Board concludes that an award at the bottom of the permissible range of statutory damages is appropriate. Accordingly, the Board awards \$750 in statutory damages.

V. Conclusion

The Board finds Respondent, Celil Akgobek, liable for infringement, and awards Claimant, Wendy Papula \$750 in statutory damages. The Board also orders Respondent to permanently delete his “Liberal Tears” listing and to rescind the counternotice he filed on July 17, 2024, as he agreed to do. 17 U.S.C. § 1504(1)(A)(IV).

Copyright Claims Board



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FINDINGS OF FACTS

Based on the submissions and the witness testimony at the July 2, 2024 Merits Conference (“Conference”), the Copyright Claims Board (“Board”) finds the following facts as established.

1. Wendy Papula is a graphic designer and e-commerce store owner who sells merchandise featuring her designs on Amazon, eBay, Etsy, Shopify, and her website redstatebotique.com. Merits Conference Testimony (“Conference Tr.”) at 11:00-14:00.
2. Cecil Akgobek is a college student and e-commerce store owner who sells t-shirts with graphic designs on Etsy under the alias “Bliss Custom Designs.” Response. (Dkt. 12); Conference Tr. at 1:17:03-1:17:14.
3. Claimant is the joint author and co-owner of an image titled “Liberal Tears Starbucks Parody,” which was registered by the United States Copyright Office effective as of June 23, 2017 (Reg No VA0002100800) (the “Work”). Claim (Dkt. 1); Claimant Exhibit A (Dkt. 24). The date of first publication of the Work is February 24, 2017. (Dkt. 24).
4. The Work was created by Claimant and co-owner George Jones (“Jones”) using Photoshop in early 2017 and was inspired by the Starbucks logo. It shows the traditional Starbucks circular logo, but replaces the words “STARBUCKS COFFEE” with the words “LIBERAL TEARS,” replaces the two stars with two

- teardrops, and replaces the Starbucks mermaid with an image of a cartoon-like girl, who is wearing a hat associated with women's marches and crying. Conference Tr. at 3:45-4:08; Exhibit A (Dkt. 24). Claimant testified that Starbucks dropped a claim regarding the logo that it brought against her in 2017. Conference Tr. at 37:54:13-39:09.
5. A Board search of Copyright Office records shows correspondence between the Copyright Office and Jones. During the course of the correspondence, Jones authorized the Copyright Office to add "Material Excluded" and "Material Included" statements to the registration to further clarify that the Work included "pre-existing artwork," which Claimant described to the Copyright Office as the Starbucks Coffee Logo. Registration Record Reg No VA0002100800 available at <https://publicrecords.copyright.gov/detailed-record/29874910>.
 6. Claimant began selling various type of mugs featuring the Work using Amazon's distribution system in March 2017. Conference Tr. at 10:35-10:57 and 1:57:25-01:57:32.
 7. On or around December 6, 2017, Claimant had the Work printed on t-shirts in four colors in various sizes ("2017 Wholesale Order"). *Id.* at 20:04-22:52.
 8. Claimant sold the t-shirts and other merchandise such as magnets, stickers and yard signs featuring the Work primarily on Amazon under the store name "Funny Political Times." Claimant also sold merchandise on other platforms, including Etsy, eBay and the Claimant's website redstatebotique.com (*Id.* at 26:00-29:56) but also sells merchandise under the aliases "Official Liberal Tears" and "Red State Boutique." *Id.* at 11:19-12:25.
 9. Claimant testified that they sold approximately 1,000 t-shirts from the 2017 Wholesale Order based on information in the receipt from the manufacturer. *Id.*

- at 30:41-32:07. From 2017 until 2020, Claimant charged between \$34.99 and \$38.99 per t-shirt. *Id.* at 47:04-47:45.
10. Claimant continued to sell the t-shirts displaying the Work until approximately January 2019. *Id.* at 27:00-28:28. Claimant testified that sometime in 2019, she stopped ordering wholesale t-shirts and was attempting to sell her remaining inventory on Etsy, eBay, and her website. *Id.* at 27:53- 28:49. At some point in 2020, Claimant began selling merchandise displaying the Work on Shopify. Conference Tr. at 29:28-30:15.
 11. In 2020, Claimant reduced the price of the t-shirts to \$22.99 in an effort to sell the remaining inventory. *Id.* at 28:00-29:01; 47:23-48:16. Claimant testified that currently she only has one or two sizes left in stock. *Id.* at 43:18- 43:28.
 12. Claimant did not produce any records or documents showing sales of merchandise featuring the Work during discovery because she stated that she does not want to reveal her business records to Respondent or the public. *Id.* at 17:17; 32:12-32:44. As such, Claimant has presented no evidence besides her own testimony related to sales.
 13. During the Merits Conference, Papula testified that she understood the potential implications of not providing the records:

“I understand. I believe it is irrelevant. Obviously, there is not much of a financial award for this infringement and you [the Board] had noted that this information would be public and I’m just not willing to do that. I’m not interested in disclosing our business model out for others... it’s not information I’d like public.”

Id. at 17:31-19:20.
 14. Claimant regularly patrols various sales platforms for potential infringement. Claimant testified that she reviews e-commerce platforms including Etsy for infringement and contacts alleged infringers. When necessary, Claimant also sends DMCA takedown notices to alleged infringers. *Id.* 49:13-49:31, 1:07:27-1:09:35.

15. Respondent testified that he searches Etsy for downloadable graphic designs he can license and sell on t-shirts. Once he finds a desirable design, he claims that he checks the listing to make sure that it includes a licensing for commercial use. He then purchases the design, and with the help of his uncle in Turkey, creates an Etsy listing for the t-shirt using Photoshop to manipulate the images he purchases. *Id.* at 1:27:40- 01:27:47. After an order has been made, the Respondent uses a print of the design to heat-press it onto t-shirts. He then sends the custom t-shirt to his customer. Response (Dkt. 12); Conference Tr. at 1:25:23-1:28:34.
16. Respondent does not contest the fact that he used the Work on t-shirts but alleges that he thought that he legally obtained a copy of the Work. He testified that he purchased a downloadable file with the “Liberal Tears Parody” design from the Etsy store “TheHogansArts” for \$2.20 on or about May 24, 2023. Respondent Evidence, Exhibit F, at page 4; Conference Tr. at 1:20:13-01:22:46; 1:33:09-1:33:29.
17. Respondent alleges that “TheHogansArts” listing included a license for commercial use but says he no longer has a copy of the listing and can provide no other details about it. Conference Tr. at 1:21:34-1:23:03; 1:25:15-1:26:45; Respondent’s Interrogatory Responses, submitted as Claimant Evidence, Exhibit H at No. 2 and 4 (Dkt. 27).
18. Respondent submitted a May 24, 2023 email from Etsy which he calls a “Receipt screenshot showing respondents purchase of the design from Etsy” regarding his alleged purchase of the graphic from “TheHogansArts.” Respondent Evidence List at 1 (Dkt. 29). However, the email itself, titled “An update on your recent order,” states that the purchase of the design “was unable to be completed,” and is not the actual receipt for his purchase of the design. Respondent Evidence, Exhibit F; Conference Tr. at 1:20:13-1:22:51.

19. Respondent did not submit a confirmation or receipt of purchase or license for use of the Work from “TheHoganArts” as evidence. Conference Tr. at 1:22:11-1:22:21. He, in fact, testified that Etsy does not send confirmation of purchases or receipts to customers. Conference Tr. at 1:31:18-1:31:24.
20. After the Mertis Conference, the Board ordered the Respondent “to do a reasonable search for any confirmation email or receipt for the digital download purchase at issue.” Copyright Claims Board Docket Note (Dkt. 34). On July 20, 2024, the Respondent filed a sworn statement that affirmed he conducted a search and contacted Etsy, but was unable to produce a confirmation or receipt. Respondent’s Statement (Dkt. 35).
21. Respondent testified that he listed the Work for sale for two weeks between May 25, 2023, and July 13, 2023. Conference Tr. at 1:32:56-1:37:34.
22. Respondent testified that during that period he sold one t-shirt featuring the Work for \$17.49 and incurred a cost of \$4.00 for the t-shirt. Conference Tr. at 1:28:41-1:28:55; Respondent’s Position Statement at 1 (Dkt. 30); Respondent’s Evidence, Exhibit E (Dkt. 29).
23. On July 13, 2023, Claimant sent a DMCA takedown notice to Etsy alleging that Respondent’s t-shirt listing was infringing the Work. Claim Attachment (Dkt. 1).
24. On July 17, 2023, Respondent submitted a counternotification to Etsy stating that Respondent affirmed that “the material was removed or disabled by mistake or because of misidentification of the material.” *Id.* After Respondent filed his counternotice, Etsy restored the material that had been taken down (Interrogatory Responses, submitted as Claimant Exhibit H at No. 11), but he later voluntarily removed his live t-shirt listing shortly before he received the Claim from Claimant. Claimant Exhibit G (Dkt. 20); Conference Tr. at 1:34:34-1:34:58. It appears that the listing still appears on Etsy although it is not live. Conference Tr. at 2:03:35-

2:04:13.

25. After receiving the counternotice, Claimant filed this claim on July 17, 2023. Claim (Dkt. 1).
26. Claimant testified that Respondent's listing caused her stores harm because Respondent's listing drove internet traffic to Respondent's listing instead of hers because "he had a better price. So, Etsy pushed that higher because Etsy makes the commission off of every sale that's made on their platform. They push what they think will sell faster." Conference Tr. at 40:11- 42:26. She also testified that her business was hurt because there is a counternotice on Etsy that states that she filed a fake copyright infringement notice. Conference Tr. at 2:05:03-2:10:08.
27. Claimant testified that "at the time of infringement we only had two sizes of the design in stock in two colors...So he couldn't have hurt our [t-shirt] sales on what he sold because we didn't have it in stock." *Id.* at 43:25-43:28.
28. Claimant also testified that she could not identify any monetary harm because "it is impossible to say how the infringement affected our sales." *Id.* at 44:32-44:57.
29. Claimant has requested the maximum allowable amount of statutory damages in a smaller claim, which is \$5,000. Claimant's Position Statement at 1 (Dkt. 28).
30. During the Merits Conference, the Respondent agreed to permanently delete his "Liberal Tears" Etsy listing and rescind the counternotice filed on July 17, 2024. *Id.* at 2:04:00-2:05:39.