



COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0008
December 14, 2023

Daniel C Corjulo

CLAIMANT

v.

Scott Mandrell

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 Daniel C Corjulo (“Corjulo” or “Claimant”) and awards him \$2,250 in statutory damages.

I. Procedural History

This claim was filed on June 16, 2022, by Corjulo against respondent Scott Mandrell (“Mandrell” or “Respondent”). Claim (Dkt. 1). The Board found the Claim compliant and, on July 7, 2022, directed Claimant to serve Mandrell within ninety days. (Dkt. 4). Claimant then amended his Claim, which the Board again found compliant on July 29, 2022. (Dkt. 7-8). Claimant filed a proof of service on October 4, 2022, which contained an “Affidavit of Non-Service,” showing operative service under Missouri law on August 3, 2022, due to Respondent’s refusal to accept service. (Dkt. 12). The Board extended the opt-out period in this proceeding due to an error made by Claimant when he filed his proof of service, and sent a Second Notice to Respondent by mail on October 5, 2022. (Dkt. 15). The Board did not receive an opt-out form from Respondent.

On November 4, 2022, the Board notified the parties that the Claim had entered the “active phase” because Mandrell did not submit a timely opt-out, and ordered Corjulo to pay the second filing fee and Mandrell to register for the Board’s online docketing system (eCCB). (Dkt. 16). On November 21, 2022, the Board issued a Scheduling Order (Dkt. 19) and a Second Notice for Mandrell to register for eCCB. (Dkt. 18). The Board issued all of the foregoing orders through eCCB and also sent them to Mandrell by mail.

In the Scheduling Order, Mandrell was ordered to submit a response by December 21, 2022, but he did not. All parties were also ordered to attend an initial conference to be held on January 4, 2023. While Corjulo attended the initial conference, Mandrell did not.

On January 4, 2023, the Board issued its First Default Notice (Dkt. 20) because Mandrell had not met any of the mandatory deadlines set by the Board. The First Default Notice gave Mandrell an additional thirty days, to February 3, 2023, to file a response and register for eCCB. *Id.* On January 20, 2023, the Board issued its Second Default Notice (Dkt. 21), reminding Mandrell of the deadline to cure the missed obligations. These notices were issued on eCCB and sent to Mandrell by mail.

Mandrell failed to file a response or register for eCCB by February 3, 2023. Accordingly, on February 16, 2023, the Board ordered Claimant to submit written direct testimony in support of a default determination. (Dkt. 23). Claimant submitted the required written materials on March 17, 2023, but on April 3, 2023, Mandrell contacted the Board and asked to engage in the proceeding and participate for the first time. (Dkt. 51). The Board held a conference on April 19, 2023, with both parties, and then issued an Amended Scheduling Order, requiring Mandrell to file a response to the Claim by May 22, 2023, and stating that discovery would start immediately after the response was filed. *Id.* Mandrell filed his response on May 21, 2023. (Dkt. 54).

An August 8, 2023 conference with the Board was held to resolve certain discovery disputes, and discovery was closed as of August 14, 2023. (Dkt. 59). The case proceeded to the written testimony stage, which was completed on November 6, 2023. (Dkt. 73). This case is now ready for final determination.

II. Factual History

The facts relevant to this Final Determination are largely uncontested.

Corjulo states that he was previously a photojournalist at the *Hartford Courant*, where he became friends with another reporter, Rinker Buck. Witness Statement of Daniel Corjulo (“Corjulo Decl.”) at 4. (Dkt. 66). Mr. Buck became a successful writer and asked Corjulo to take photographs for Buck’s next book, which was “to be a revisionist history of the Mississippi and Ohio Rivers,” and was eventually titled *Life on the Mississippi*. *Id.* Corjulo saw this as an “opportunity to reestablish my photojournalism credentials in a new and changed market.” *Id.*

As part of the four-month long project, Corjulo took many photographs, three of which are the subject of this proceeding. He registered the three photographs, titled DSC08818.JPG, DSC09049.JPG, and DSC09083.JPG, as part of a group registration (Reg. No. VA0002286993) (collectively, “the Images” or the “Work”). *Id.*, at 1-2; Amended Claim (Dkt. 7); Letter to Stop (Dkt. 45). According to Copyright Office records (available at copyright.gov), his February 9, 2022 registration for the Work states that the photographs covered by the registration were created in 2016 and published between August 1, 2016, and October 31, 2016.

Mandrell is not a stranger to Corjulo. Mandrell joined the flatboat trip “down the Mississippi for approximately two (2) weeks of the four (4) month trip,” and about a year after the trip, Mandrell obtained ownership of the flatboat, *Patience*, used on the trip. Corjulo Decl. at 5. Two of the images at issue are of photographs of the *Patience* (DSC09049.JPG (Dkt. 28) and DSC08818.JPG (Dkt. 46)) and one of the images is a photograph of Mandrell (DSC09083.JPG (Dkt. 26)).

On approximately December 2, 2021, Corjulo discovered that the Images were on display on the website of the Respondent, thegreatfloat.com. Corjulo Decl. at 2. The Images were displayed as thumbnails within a group of eleven total thumbnail images in the Photo Gallery section of Mandrell’s website. TheGreatFloat Website 2.png (Dkt. 25). Corjulo claims that Mandrell used the Images “to promote his future plans” and “to promote his website and business without my permission and without payment.” Corjulo Decl. at 5. However, Corjulo presents no evidence that any actual business is promoted on Mandrell’s website. Mandrell further denies that his use was commercial, stating “[t]he website where these images appeared existed solely to document our educational outreach and had no mechanism for monetization associated with it, whatsoever.” Response to Corjulo, at 4. (Dkt. 72).

Mandrell admits to copying the Images and does not suggest he had Corjulo’s permission to use the Images, but states that because the photographs were used to document his work, their use is fair use. *Id.* He submits three third-party witness statements that are the equivalent of character statements for the general proposition that Mandrell gained nothing from the use of the Images and, in the Declaration of James “Brady” Carr, that no one on the flatboat trip mentioned copyright ownership even though many people on the trip shared pictures that they

took with each other. *See* Declaration of John Cooper, at 2 (Dkt. 69); Declaration of James “Brady” Carr, at 2 (Dkt. 70); Declaration of Lance “Jay” Rotkin, at 2 (Dkt. 71).

Corjulo states that he would never have “sold” the Images for “less than \$10,000 apiece.” Corjulo Decl. at 5. He states that there was “a limited window of opportunity in which to maximize profit on these images,” which he lost because of Mandrell’s actions. *Id.* at 3. He states that many publications demand that any images they license be “exclusive,” and because of Mandrell’s use, he could not license the Images as exclusive. *Id.* at 2, 8. However, Corjulo does not submit as evidence anything he has actually been paid for the licensing of any of his photographs, exclusive or non-exclusive. He submits a Writer’s and Photographer’s Contract to show a publication that stated it would accept submissions of his photographs, and if they were licensed, it would be on an exclusive basis. Boat US Contract (Dkt. 67). The “contract” is not signed by the publication and states “\$ TBA” for the Payment Amount. *Id.* Corjulo asks the Board to “value each image at \$10,000,” (Corjulo Decl. at 6), but requests an award of \$5,000 in statutory damages per image for a total award of \$15,000. Response to Order Regarding Claimant Filings (Dkt. 64).

III. Defenses

Mandrell admits that the Images were posted on his website and does not claim that he received Corjulo’s permission; nor does he contest that Corjulo took the photographs or any of the elements of copyright infringement. He states that “[t]he photos in question had been included in a collage of images that documented the work we [Mandrell and Mandrell’s associates] had done over several decades on multiple expeditions in a variety of vessels.” Response to Corjulo, at 3 (Dkt. 72). The only defense raised by Mandrell in his papers is that of “fair use,” and Mandrell’s entire discussion of fair use is to state:

Now, let me address the use of the images in question. They were used in accordance with the Fair Use. It is my understanding that under the fair use doctrine of the U.S. copyright statute, it is **permissible to use limited portions of a work including images**, for purposes such as commentary, criticism, news reporting, and scholarly reports. The website where these images appeared existed solely to document our educational outreach and had no mechanism for monetization associated with it, whatsoever.

Id. at 4 (emphasis in Response to Corjulo).

Four non-exclusive factors are considered when analyzing a fair use defense: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107; *United Telephone Co. of Missouri v. Johnson Publishing Co.*, 855 F.2d 604, 609 (8th Cir. 1988). The proponent of the affirmative defense of fair use has the burden of proof on the issue. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); *American Production & Inventory Control Society, Inc. v. Auxier*, No. 11-00956-CV-SJ-BP, 2013 WL 12152447, at *2 (W.D. Mo. May 28, 2013).

Based on the evidence in the record, the Board cannot conclude that any of the fair use factors weighs in favor of fair use. The evidence presented on the first factor is not conclusive regarding whether Mandrell’s use of the Images is commercial. Mandrell’s website does appear to promote himself and potentially his business given that the website is touting his experience as a tour guide, but the evidence does not show any attempt at monetization, and so it is difficult to say for certain if the use is commercial. The use is certainly not transformative, as Mandrell is using the Images to illustrate what they depict—Mandrell himself and the boat that the parties sailed during the Rinker Buck project. *See McGucken v. Pub Ocean Ltd.*, 42 F.4th 1149, 1158 (9th Cir. 2022); *Campell v. Gannett Co., Inc.*, Case No. 4:21-00557-CV-RK, 2023 WL 5250959, at *5 (W.D. Mo. Aug. 15, 2023) (identical depictions not transformative). Mandrell is not entitled to use a photograph without permission just because he or a boat he traveled on or owns is the subject of the photograph (just as celebrities are not entitled to post on social media photographs of themselves taken by paparazzi). And Mandrell’s use makes no commentary, criticism, or reporting on the photographs themselves. He uses the Images as a vehicle to show his participation and expertise in flatboat projects. Thus, the first factor does not favor fair use.

As to the second factor, Corjulo’s photographs are creative in nature, which weighs against fair use. *See Brammer v. Violent Hues Productions, LLC*, 922 F.3d 255, 267 (4th Cir. 2019) (“As a basic matter, photographs are ‘generally viewed as creative, aesthetic expressions of a scene or image’ and have long received thick copyright protection”) (citation omitted); *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 743 (9th Cir. 2019) (“photographers’ images are

creative, especially when they are created for public viewing”).

With reference to the third factor, Mandrell’s use of the entirety of the Images, even a small copy of the Images, also disfavors fair use. *See Campbell*, 2023 WL 5250959, at *5.

As to the fourth factor, Mandrell does not argue or provide evidence tending to show that there was no effect of the use upon the potential market for or value of the copyrighted work. Corjulo, on the other hand, states that he licenses his works and that his works have less value when he cannot license them as exclusive works. Corjulo Reply to Mandrell Witness Response Statement, at 3-4 (Dkt. 73); Corjulo Decl. at 2. Furthermore, Corjulo created the Images as part of many photographs he took with the intent of licensing at least some of them for the Rinker Buck book and in the future, so there does appear to be a market available for the Images. While Corjulo’s actual evidence on this point is thin, as stated above, fair use is an affirmative defense, so the burden is on Mandrell to prove the defense applies. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 590; *American Production & Inventory Control Society, Inc.*, 2013 WL 12152447, at *2.

Finally, even if Corjulo had decided not to license the Work at all, he has the right to make that decision rather than see his works used without permission. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1181 (9th Cir. 2012) (deciding that the market factor tipped against defendant and stating that the factor “focuses on *potential*, not just actual, market harm”) (emphasis in original).

Mandrell has not satisfied his burden on the affirmative defense of fair use, and he has no other viable defenses to Corjulo’s infringement claim. Therefore, the Board finds for Corjulo on the issue of liability and moves to the question of damages.

IV. Damages

Corjulo requests statutory damages. Before the Board, the maximum award of statutory damages is \$15,000 per work for works timely registered (either before the infringement started or within three months of first publication of the infringed work) and \$7,500 for works not timely registered. 17 U.S.C. § 1504(e)(1)(A)(ii). In this proceeding, the Work was registered February 9, 2022 (and published in 2016), and Corjulo states in his Claim that the infringement started in 2021. Therefore, the maximum statutory award is \$7,500 per work infringed. Corjulo asks the Board to

“value each image at \$10,000” (Corjulo Decl. at 6) but requests an award of \$5,000 in statutory damages per image for a total award of \$15,000. (Dkt. 64). As stated below, a question for the Board to resolve is whether the three photographs should be treated as one work (which would limit the overall maximum to \$7,500) or three for statutory damages purposes.

A. Number of Works

A separate award of statutory damages is mandated for each “work” infringed, 17 U.S.C. § 504(c), but there are different ways of establishing what constitutes a work. Although the Eighth Circuit, where Mandrell is located, has not addressed this question, various circuits have. Some have followed the “independent economic value” test, which for photographs states that, even if registered together, the photographs shall be treated as separate works if they have value on their own and not solely as a group; that is, they can “live their own copyright life.” *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990). *See also Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993); *Sullivan v. Flora, Inc.*, 936 F.3d 562, 570-571 (7th Cir. 2019); *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1193 (9th Cir. 2001); *MCA Television, Ltd. v. Feltner*, 89 F.3d 766, 768-769 (11th Cir. 1996). At least one district court in the Eighth Circuit has also followed this test. *See FurnitureDealer.Net, Inc v. Amazon.com, Inc*, No. CV 18-232 (JRT/HB), 2022 WL 891473, at *15 (D. Minn. Mar. 25, 2022) (“This Court finds that the most appropriate test in determining whether a copyright owner is entitled to more than one statutory damage is the independent economic value test.”).

The Second Circuit, however, focuses its test on whether “the plaintiff—the copyright holder—issued its works separately, or together as a unit,” otherwise known as the issuance test. *Bryant v. Media Right Prods.*, 603 F.3d 135, 141 (2d Cir. 2010) (granting one statutory damages award for each musical album infringed instead of each individual song).

The issuance test can often have the same result as the independent economic value test, and under the issuance test, the same works can be viewed differently depending on how the copyright owner treated them. *See, e.g., EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 101 (2d Cir. 2016) (“the District Court properly allowed

separate statutory damages awards for songs that the plaintiffs issued as singles, even if those songs were also made available on albums”). That is the case here.

There is no evidence that Corjulo issued the photographs in question intending them to be part of a single compilation. He took many photographs over four months on the flatboat trip. Corjulo Decl. at 4. He published 120 of them over the course of three months on the website for Rinker Buck’s book, and then he registered them as a group registration of photographs, not as a compilation or as one particular work. Copyright Registration; Corjulo Decl. at 5. Some of the photographs were also issued within the *Life on the Mississippi* book. (Dkt. 42-44). Corjulo has submitted evidence that the goal from the beginning was to license his photographs separately, whether as part of Rinker Buck’s book or otherwise. Corjulo Decl. at 3-8. As for independent economic value—to the extent relevant—the fact that a small selection of the photographs was selected for *Life on the Mississippi*, and a different small selection was chosen by Mandrell for infringement, is additional evidence here that the whole is not necessary for the parts to have value.

Therefore, the Board concludes that each of the three Images at issue are subject to their own statutory award.

B. Amount of Damages

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, 231–232 (1952); *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807 F.2d 1110, 1116 (2d Cir. 1986); *Bryant*, 603 F.3d at 143. “[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).

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) (while 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) (“numerous courts have held that asserted statutory damages should bear some relation to the actual damages suffered”).

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, 165 (2d Cir. 2001).

In applying this principle, various courts have limited statutory damages to the \$750 minimum where a plaintiff does not submit valid proof of actual damages. *See, e.g., Atari Interactive*, 546 F. Supp. 3d at 888-89 (“Harmonizing these principles [related to statutory damages], the Court concludes that Atari may seek an award of minimum statutory damages without disclosing any damages calculations but, to avoid a potential windfall, it must provide some evidence of its lost profits or Redbubble’s profits if it seeks an award greater than the statutory minimum.”).

Beyond conclusory statements that any license he entered into after Mandrell’s infringement would be tainted as non-exclusive, and he would not have “sold” the images to Mandrell for less than \$10,000 each (Corjulo Decl. at 2, 5-7), Corjulo has submitted no evidence of any actual damages. He submitted a single draft license that was: (a) unsigned by the licensee; (b) not for a particular photograph but structured such that Corjulo could submit

photographs for publication that could then be accepted or not by the licensee; and, (c) had a price that simply said “TBA.” (Dkt. 67). The Board therefore disregards that submission. There is no evidence that Corjulo has ever licensed the Images or any other photographs for any payment, including the photographs used in *Life on the Mississippi*.

Moreover, there is no evidence that Mandrell gained anything through his use of the Images. The Images were thumbnails among various photos showing projects Mandrell had worked on. They were not sold by Mandrell or used to promote the sale of any specific product or service.

Based on the lack of any evidence of actual damages or any reasons to increase the award from the statutory minimum, the Board concludes that an award at the bottom of the permissible range of statutory damages is appropriate. Accordingly, the Board awards \$750 per Image infringed.

V. Conclusion

The Board finds Respondent, Scott Mandrell, liable for infringement, and awards Claimant, Daniel C Corjulo, \$2,250 in statutory damages.

Copyright Claims Board