COPYRIGHT CLAIMS BOARD

Docket number: 24-CCB-0005
March 31, 2025

Kimberlin Photography LLC	*v.*	Katherine Velasco
CLAIMANT		**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 Kimberlin Photography LLC ("Kimberlin" or "Claimant") and awards $1,200 in statutory damages.

Kimberlin filed this claim for copyright infringement against Katherine Velasco ("Velasco" or "Respondent") on January 10, 2024. Claim (Dkt. 1). The original claimant was Kimberly Mullin ("Mullin"), owner of Kimberlin, but the claim was amended to replace the claimant, switching out Mullin for Kimberlin, by an Order entered on January 22, 2025. (Dkt. 35). The Claim alleges that Kimberlin took photographs of a condominium for the seller of that property, which was subsequently bought by Velasco; it further alleges that Velasco later used those same photographs to rent the property without Kimberlin's permission thereby allegedly infringing Kimberlin's copyright. Following discovery, the parties filed their written testimony, and the case is now ready for final determination.[1]

I. Excluded Evidence

Before addressing the merits, the Board notes that its January 22, 2025 Order excluded some of the evidence submitted with Kimberlin's reply testimony, namely Exhibits 6 (Dkt. 26), 7 (Dkt. 28), 9 (Dkt. 23), 10 (Dkt. 27), and 12 (Dkt. 24). Those exhibits were not considered by the Board in making its determination.

[1] Each party combined (at least) its witness statement and party statement into a single document. Dkt. 16 is both a witness statement of Kimberly Mullin ("Mullin Decl.") at pages 1-16 and a party statement ("Kimberlin Party Statement") at pages 16-19. Dkt. 19 is a witness statement of Katherine Velasco ("Velasco Decl.") at pages 1-5 and a party statement ("Velasco Party Statement") at pages 5-12, followed by an evidence list and Velasco Exhibits 1-3. Dkt. 25 is a reply witness statement of Kimberly Mullin ("Mullin Reply Decl.") at pages 1-7 and a reply party statement ("Kimberlin Reply Statement") at pages 8-14.

II. Factual History

The facts relevant to the Board's Final Determination are largely undisputed except as noted below. Kimberlin was hired to take photographs of a condominium that the owner was about to sell. Mullin Decl. ¶ 2. As part of the project, which took place on October 13, 2023, Mullin of Kimberlin worked with the condo owner to stage the condo, took multiple shots of what the owner wanted, sent the images to Kimberlin's editors, and did additional edits when the images came back as well as further edits requested by the condo owner. *Id.* ¶¶ 2-3. Velasco purchased the condo, and on December 4, 2023, that same original condo owner informed Mullin that Velasco, for the purpose of renting out the property, had uploaded listing photos taken by Mullin to rental websites including Zillow.com. *Id.* ¶ 5; Kimberlin Exhibit 1 (Dkt. 17) at 28. Velasco did not have Kimberlin's permission to use the photographs. Mullin Decl. ¶ 5; Kimberlin Exhibit 1 at 2-3, 28-31.

Mullin immediately messaged Velasco through Zillow.com and Trulia.com. Velasco responded by the next morning stating that she did not know who had taken the photographs, but only planned to use them for a short period to rent the property and asked for a quote on how much Kimberlin wanted for the use. Mullin Decl. ¶ 5. Mullin responded nine minutes later, chastising Velasco for the use but giving a quote, stating: "[l]icensing for commercial use for rental properties are $35/angle. That gives you rights to advertise using my images as many times as you like and for as long as you want." *Id.* ¶ 6; Kimberlin Exhibit 1 at 3. Mullin also gave Velasco a link to a drive that had additional photographs of the property in case Velasco wanted to license any of those as well. *Id.*

Not hearing back that day, Mullin sent a series of emails over the next three days (December 6-8), including threatening a lawsuit. Mullin Decl. ¶¶ 7-9; Kimberlin Exhibit 1 at 3-4. Velasco responded on December 8, immediately after that morning's email, to state that she would take the photographs down. Mullin Decl. ¶ 10. The parties then engaged in a back and forth with Mullin chastising Velasco multiple times and Velasco apologizing multiple times. *Id.* ¶¶ 11-14.

At some point the next day, Mullin noticed the photographs on what she says were new rental property websites and sent an email asking Velasco to take them down, but she received no response. *Id.* ¶¶ 15-17. Mullin reached out to the websites where the photographs were posted to get them taken down; it appears, according to Mullin,

that the last website to take them down acted by December 21, 2023. *Id.* ¶¶ 18-25, 29; Kimberlin Exhibit 1 at 13-15, 21-23, 25, 27.

Kimberlin registered a single copyright (for a group of published photographs) in the 58 images Mullin took of the property for the prior condo owner (the "Work"). Mullin Decl. ¶ 26. The Work was given copyright Reg. No. VA0002381069, with an effective date of December 13, 2023. *Id.*; Velasco Exhibit 3 (Dkt. 19). Mullin had sent 40 of those 58 images to the prior owner, who used them in the sales listing; Velasco used 26 of those 40 images without Kimberlin's permission. Mullin Decl. ¶¶ 26, 28.

Velasco does not deny the use of the photographs without permission, but states that she did search for the owner of the photographs before use and immediately agreed to remove the photos as well as purchase a license. Velasco Decl. ¶¶ 2-7. She states that she had difficulty requesting the listing to be taken down from property websites, which is why it took until mid-December. *Id.* ¶ 8. She felt that Kimberlin's $35 per image rate (which Kimberlin totals to be $875, although $35 times 26 is $910) was unreasonable, but the situation escalated (and her mother became ill) before she had the chance to resolve the issue with Mullin. *Id.* ¶¶ 9-17.

Kimberlin requests statutory damages for each image infringed up to the maximum $30,000 total allowed in proceedings before the Board. Mullin Decl. ¶ 30. Kimberlin states that it "respectfully requests statutory damages in the maximum amount of $1,153 per image infringed," which, when multiplied by 26, is just under $30,000. Kimberlin Party Statement, at 18. Kimberlin's main reason for this large of a damages request is "because of the willful nature of the infringement and the apparent cavalier attitude Velasco had towards the mere idea of paying for someone else's work." *Id.* Mullin's Declaration also requests that Velasco's infringement be classified as "bad faith," and requests an award of attorney's fees. Mullin Decl. ¶ 31.

The maximum amount of statutory damages the Board can award for a single infringed work is $15,000 for works timely registered under 17 U.S.C. § 412, with a $30,000 total maximum award for a proceeding. 17 U.S.C. §§ 1504(e)(1)(A)(ii)(I), 1504(e)(1)(D).

The statute relating to Board damages awards expressly prohibits the Board from taking the concept of willfulness into account, 17 U.S.C. § 1504(e)(1)(A)(ii)(III), so the Board will not do so in determining damages, and

bad faith applies only to actions taken in the course of a Board proceeding, not as a proxy for willfulness in the infringement. 37 C.F.R. § 220.1(c).

III. Analysis

a. Liability

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). The Work was registered by Kimberlin as a group registration of published photographs, with an effective date of December 13, 2023. Because the Certificate of Registration was effective within three months of the first authorized publication of the Work, it is prima facie evidence of the validity of the copyright and of the facts stated in the certificate. 17 U.S.C. §§ 410(c), 1505(c).

Access is clearly established here and there is no dispute from Velasco that 26 images in the Work were copied for her rental listing. Furthermore, as to substantial similarity, 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)). In this case, what Velasco used are identical copies of images included in the Work.

Velasco reproduced and posted copies of substantially similar versions of the Work in its rental listings. She did so without authorization of Kimberlin. Without a valid defense, such actions constitute a violation of Kimberlin's exclusive rights of reproduction and public display. *See, e.g., TeamLab Inc. v. Museum of Dream Space, LLC,* 650 F. Supp. 3d 934, 949 (C.D. Cal. 2023) (unauthorized posting on the Internet violated the reproduction and public display rights); *Doggie Dental v. Shahid*, No. 4:19-CV-01705-KAW, 2021 WL 4582112 (N.D. Cal. June 17, 2021) (report and recommendation) (same).

Velasco presents no defense in her papers, other than the claim that Kimberlin, not the original claimant Mullin, owns the photos. That issue has been rectified through the amendment of the claim to replace Mullin with Kimberlin as the claimant, so no alleged defense remains. (Dkt. 35).

b. Damages

Kimberlin requests $1,153 in statutory damages for each image infringed, for a total that is approximately the maximum $30,000 total allowed in proceedings before the Board. The most the Board can award in statutory damages for a single infringed work that has been timely registered is $15,000. $1,153 per "work" infringed is well within the statutory range.

Typically, the statutory minimum is $750 per work infringed. *See* 17 U.S.C. §§ 504(c), 1504(e)(1)(A)(ii). Velasco argues that the Board should find that she is an "innocent infringer," because she was not aware that her acts constituted infringement and had no reason to believe her acts constituted infringement, and the Board should therefore award only $200 in statutory damages under 17 U.S.C. § 504(c)(2). Velasco Party Statement, at 7-8. Velasco's argument seems to hinge, however, not on a belief that she wasn't committing infringement (or had no reason to know she was), but that she didn't know *whose* work she was infringing. *See id.* (stating that Velasco looked for, but didn't see, a watermark or other evidence to show who might have claimed ownership); Kimberlin Exhibit 1, at 2-3, 5 (Velasco communications to Mullin stating that she had not reached out to Velasco because, on the face of the photographs, she "could not tell who took them," and stating that she owns multiple homes and, as a new buyer of a home, she typically "uses other photos without any issue"). Velasco could have easily contacted the listing agent or seller of the property to find out who took the pictures. *See* Mullin Decl. ¶ 6. Thus, Velasco presents no basis to find that she had no reason to know that these very recently taken photographs were not owned by someone and were free to use without a license. Finally, Section 504(c)(2) merely gives the Board "discretion" to lower the damages in an innocent infringer case. The Board declines to do so here.

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); *Peer Int'l Corp. v. Pausa Records, Inc.,* 909 F.2d 1332, 1336 (9th Cir. 1990). "[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).

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.*, *Seoul Broad. Sys. Int'l v. Young Min Ro*, No. 9-cv-433, 2011 WL 3207024, at *8 (E.D. Va. July 27, 2011); *Atari Interactive, Inc. v. Redbubble, Inc.*, 546 F. Supp. 3d 883, 888 (N.D. Cal. 2021). Here, Kimberlin itself said that it would have licensed the 26 images to Velasco at $35 each, which amounts to a total maximum loss of $910.

However, Kimberlin has an additional problem in arriving at that amount of actual damages. Other than Mullin's statement to Velasco that Velasco could license the images for $35 each, Kimberlin presents no evidence at all that it has ever licensed individual images, never mind licensing individual images from a prior photo shoot. Kimberlin does not even offer evidence that this is a standard rate or offer for its previously taken photographs.[2]

As such, there is no evidence that Kimberlin should be awarded much, if anything, beyond the statutory minimum per work infringed if based solely on Kimberlin's losses.

A further question, however, remains for the Board. Should Kimberlin be awarded one statutory award or 26, one for each image infringed? There is little doubt that giving 26 awards of even the $750 minimum, which would amount to $19,500, would be overly generous and not in the interests of justice, and would be well over 20 times what Kimberlin told Velasco its rate was for licensing all 26 images for "as many times as you like and for as long as you want."

Additionally, under the law, "all the parts of a compilation or derivative work constitute one work" for purposes of calculating statutory damages." 17 U.S.C. § 504(c)(1). Both parties acknowledge that in determining whether the photographs were parts of a compilation, the Board should consider whether they, taken individually, can be said to

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[2] Because Respondent asked for Kimberlin Exhibits 7 and 9 (Dkt. 28 and 23) to be excluded as they were never produced in discovery and the Board granted that request, the Board will not use those exhibits as evidence in coming to its determination. However, the Board notes that such exhibits would have only hurt Kimberlin. Exhibit 7 shows that Kimberlin was paid a total of $345 for a lengthy photo shoot, including all of Kimberlin's time and expenses and a license to use all 40 edited photographs (plus drone and location photographs) for the lifetime of the listing, which amounts to less than $10 per image (with a $25, not $35, charge for relisting). Exhibit 9, according to Kimberlin, supposedly showed Kimberlin's "rates," but no actual rates are listed and all the services listed appear to be for photo sessions and not for licensing of preexisting photographs.

have "independent economic value." Kimberlin Party Statement, at 17; Velasco Party Statement, at 9. That consideration asks whether, even if registered together, the photographs should be treated as separate works if they have value on their own or solely as a group; that is, whether they can "live their own copyright life." *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1193 (9th Cir. 2001); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993); *Sullivan v. Flora, Inc.*, 936 F.3d 562, 570-71 (7th Cir. 2019); *MCA Television, Ltd. v. Feltner*, 89 F.3d 766, 768-69 (11th Cir. 1996).

The Board has considered whether the photographs at issue here have "independent economic value." All of the images in the Work were taken at one time as part of a single assignment to market the sale of a particular piece of property. They were also used that way (albeit to rent, not sell that property) by Velasco. Kimberlin's main argument is that some of the 58 photographs Mullin took were not sent to the original property seller to use (only 40 were) and Velasco did not use every one of those 40. However, while that may mean that not every single image is necessary for the group's economic value, it does not mean that any *one* photograph, on its own, could "live [its] own copyright life." *VHT, Inc. v. Zillow Group, Inc.*, 69 F.4th 983, 990 (9th Cir. 2023) (stating that the focus in on the individual piece alleged to be its own work and giving the example of a quilt: "ask whether any one individual patch has discernable, independent economic value—whether once separated from the quilt a particular patch lives its own copyright life") (quoting *Sullivan*, 936 F.3d at 572). The photographs at issue in this proceeding were taken for (and the only evidence of their potential use is for) a very specific purpose—to market an entire property. There is no evidence that there is any market for a single photograph of, for instance, a shower, or a counter, or a window, or a hallway, by itself. *See Coogan v. Avnet, Inc.,* No. CV-04-0621-PHX-SRB, 2005 WL 2789311, at *6 (D. Ariz. Oct. 26, 2005) (photo shoot with the same photographer, subject, and location, and without any evidence of separate marketing or selling of the photographs, resulted in one award); *accord Tang v. Putruss,* 521 F. Supp. 2d 600, 610 (E.D. Mich. 2007) (citing *Coogan*).

Therefore, the Board concludes that, given the lack of any evidence proving the amount of Claimant's actual damages, and the Board's determination that there should be a single statutory damages award, it is appropriate to award somewhere near the $750 statutory minimum in this case. However, while it is the Board's usual practice to

award statutory damages in an amount that bears a relationship to actual damages, the Board is also guided by "what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like." *L.A. Westermann Co.*, 249 U.S. at 106. Here, that justifies a small increase from the minimum. Velasco used Kimberlin's photographs for a commercial use and clearly did so because such use would likely help her rent the property and provide her with an income stream. Kimberlin is a professional photographer and worked not only on staging and editing of the photographs, but took drone photographs of the overall property area.

On balance, the damages awarded should exceed the minimum of the statutory range, and $1,200 is a just amount. *See, e.g., Stross v. Smith Rock Masonry Co., LLC*, No. 6:19-cv-01394-AA, 2021 WL 2453388, at *4 (D. Or. June 16, 2021) (in a default judgment, awarding $1,500 for the use of a photograph on a commercial website despite lack of evidence as to harm to plaintiff or benefit to defendant); *Nat'l Hair Growth Centers of Arizona, LLC v. Edmund*, No. 3:19-cv-00026-H-BGS, 2019 WL 2249976, at *6 (S.D. Cal. May 23, 2019) (in a default judgment, awarding statutory damages of $1,000 per photograph infringed where there was no evidence of harm, and noting other cases with similar awards). $1,200 is also appropriate to deter Velasco and others from using Kimberlin's images without paying the appropriate license fees. As shown in part by how upset Kimberlin's client was with Velasco's use of the photographs the property seller paid for, Kimberlin's ability to get hired as well as to license photographs depends, in part, on the enforcement of unlicensed usage of its photos; otherwise, others will believe they can utilize Kimberlin's photos for commercial purposes without paying any license fees.

IV. Conclusion

The Board finds Katherine Velasco liable for infringement, and awards Claimant Kimberlin Photography LLC $1,200 in statutory damages.