



COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0100

October 4, 2023

Joe Hand Promotions, Inc.

CLAIMANT

v.

The Village Restaurant LLC d/b/a Indian Village
Restaurant & Lounge, Brittany R. Havelly, Roger A.
Singleton, Joe Havelly, and Lorene A. Singleton

RESPONDENTS

FINAL DETERMINATION

On August 31, 2023, the Copyright Claims Board (Board) issued the below Proposed Default Determination. The Proposed Default Determination, a Notice of Proposed Default Determination, and a Notice Regarding Dismissal in Proposed Default Determination (as to the individual respondents) were posted on the Board's electronic filing system (eCCB) and sent via mail to the addresses on file for The Village Restaurant d/b/a Indian Village Restaurant & Lounge, Brittany R. Havelly, Roger A. Singleton, Joe Havelly, and Lorene A. Singleton. More than thirty days have passed, and neither The Village Restaurant d/b/a Indian Village Restaurant & Lounge nor Joe Hand Promotions, Inc. has responded to the Proposed Default Determination. Therefore, pursuant to 17 U.S.C. § 1506(u)(4), the Board issues the below Proposed Default Determination as a Final Determination. The Board: (a) finds The Village Restaurant d/b/a Indian Village Restaurant & Lounge liable for copyright infringement and awards Joe Hand Promotions, Inc. \$3,300 in statutory damages; and, (b) dismisses the claim against Brittany R. Havelly, Roger A. Singleton, Joe Havelly, and Lorene A. Singleton without prejudice.

* * * * *

The respondents, The Village Restaurant LLC d/b/a Indian Village Restaurant & Lounge ("The Village"), Brittany R. Havelly, Roger A. Singleton, Joe Havelly, and Lorene A. Singleton (collectively, "Respondents"), have not appeared or participated in this proceeding before the Copyright Claims Board (Board), and the claim is now in default. When a respondent fails to appear in a proceeding and the Board proceeds to a default determination, the Board requires the claimant to submit written direct testimony. 17 U.S.C. § 1506(u)(1); 37 C.F.R. § 227.2(a). The claimant, Joe Hand Promotions, Inc. ("Joe Hand" or "Claimant"), has submitted testimony, which the Board has reviewed, and now the Board issues this proposed default determination. 17 U.S.C. § 1506(u)(2). For the reasons

that follow, the Board finds that: (1) the presented evidence is sufficient to support a finding in favor of Claimant against The Village and proposes an award of \$3,300 in statutory damages; and (2) the presented evidence is insufficient to support a finding in favor of Claimant against Brittany R. Havelly, Roger A. Singleton, Joe Havelly, and Lorene A. Singleton, and proposes a dismissal of the claim against those four respondents without prejudice.

The Village now has thirty days, ending on Monday, October 2, 2023, from the issuance of this proposed default determination to submit any evidence or information in opposition to the proposed default determination. 17 U.S.C. § 1506(u)(2). A copy of this proposed default determination will be sent to Respondents at all addresses and email addresses reflected in the record. *Id.* If The Village submits an opposition, the Board will evaluate any materials submitted by The Village before issuing a final determination. *Id.* § 1506(u)(3). If The Village does not submit a response, the Board will issue this default determination as a final determination. *Id.* § 1506(u)(4).

Any determination against a respondent, including a monetary award for damages, will be enforceable in a court of law.

Claimant now also has thirty days, ending on Monday, October 2, 2023, from the issuance of this proposed default determination to submit a statement of no more than seven pages, that follows the requirements of 37 C.F.R. § 220.5(b) and is limited to an opposition to the proposed dismissal of Brittany R. Havelly, Roger A. Singleton, Joe Havelly, and Lorene A. Singleton. 37 C.F.R. § 227.3(a)(2). If Claimant submits such an opposition, the Board will evaluate it before issuing a final determination. *Id.*

I. Procedural History

This claim was filed on August 12, 2022. Claim (Dkt. 1). The Board found the claim compliant and, on September 21, 2022, directed Claimant to serve Respondents within ninety days. (Dkt. 2). Claimant filed proofs of service on November 22, 2022, stating that all Respondents were served on November 15, 2022 by hand delivery. (Dkt. 13-17).¹ On December 8, 2022, Claimant corrected a typo to the address in the Claim for Respondents, and

¹ The Board notes that The Village was served by hand delivery on Lorene Singleton. While the evidence submitted by Claimant suggests that the physical establishment in question is no longer owned by Ms. Singleton, a review of the Oregon Secretary of State Corporation Division's online records shows that Ms. Singleton is still listed as the registered agent for The Village Restaurant LLC.

confirmed that the address listed in the proofs of service was the correct address. (Dkt. 18). The Board sent a second notice to Respondents by mail on December 14, 2022. (Dkt. 19-23). The Board did not receive an opt-out form from any respondent.

On January 19, 2023, the Board notified the parties that the claim had entered the “active phase” because Respondents did not submit a timely opt-out, and ordered Joe Hand to pay the second filing fee and Respondents to register for the Board’s online docketing system (eCCB). (Dkt. 24). On February 3, 2023, the Board issued a Scheduling Order (Dkt. 26) and a Second Notice for Respondents to register for eCCB. (Dkt. 27). The Board issued all of the foregoing orders through eCCB and also sent them to Respondents by mail.

In the Scheduling Order, Respondents were ordered to submit a response by March 6, 2023, but they did not. All parties were also ordered to attend an initial conference to be held on March 22, 2023 (although the conference was moved to March 29, 2023 upon Joe Hand’s request). (Dkt. 29, Dkt. 31 p. 1). While Joe Hand attended the initial conference, Respondents did not.

On March 14, 2023, the Board issued its First Default Notice (Dkt. 28) because Respondents had not met any of the mandatory deadlines set by the Board. The First Default Notice gave Respondents an additional thirty days, to April 13, 2023, to file a response and register for eCCB. *Id.* On March 30, 2023, the Board issued its Second Default Notice (Dkt. 30), reminding Respondents of the deadline to cure the missed obligations. These notices were issued on eCCB and sent to Respondents by mail.

Respondents failed to file a response or register for eCCB by April 13, 2023. The Board has received no communication from Respondents to date. Accordingly, on April 25, 2023, the Board ordered Claimant to submit written direct testimony in support of a default determination. (Dkt. 31). Claimant submitted the required written materials on June 9, 2023, consisting of a party statement, two witness statements, and evidence, including an affidavit of an investigator who visited the Indian Village Restaurant & Lounge (“Indian Village Restaurant”) and witnessed the allegedly unauthorized performance of the work at issue. (Dkt. 32-43).

Pursuant to 37 C.F.R. § 227.2(b), on July 3, 2023, the Board issued an Order to Submit Additional Evidence (Dkt. 44), noting the lack of evidence related to the individual respondents’ liability and giving Claimant until July

14, 2023 to submit any additional materials it wished to support a finding of individual liability against those respondents. On July 14, 2023, Claimant submitted exhibits consisting of the personal Facebook pages of Joe Havelly (Dkt. 45), Lorene A. Singleton (Dkt. 47), Brittany R. Havelly (Dkt. 49), and Roger A. Singleton (Dkt. 50), a news article related to the Indian Village Restaurant (Dkt. 46), a September 10, 2019 two-page Amended Annual Report for The Village (Dkt. 51), and a supplement to Claimant's prior party statement (Dkt. 48).

II. Factual History

Claimant is a Pennsylvania corporation that specializes in commercially licensing premier sporting events to commercial locations such as bars, restaurants, lounges, clubhouses, and similar establishments. (Dkt. 1); Declaration of Joseph P. Hand, III (Dkt. 34), ¶ 3 ("Hand Decl."). Major sporting events, especially boxing and mixed martial arts fights, are often shown through pay-per-view (closed circuit) arrangements. Pay-per-view arrangements may be different based on whether the viewer of the event is an individual watching the event from their home, or a retail establishment, such as a bar or restaurant, showing the event for their customers. Therefore, cable and satellite television providers that broadcast pay-per-view events block them from being ordered by or shown at commercial establishments that do not pay a separate fee. Hand Decl. ¶¶ 8-9. If a commercial establishment wishes to receive and exhibit a pay-per-view event licensed by Joe Hand, it pays a fee to Joe Hand pursuant to a "rate card" for that particular event based on the capacity of the establishment. *Id.* ¶ 7. Joe Hand then notifies the location's cable or satellite provider to unscramble that program so that the establishment can show the event to its customers. *Id.* ¶ 9. By written agreement, Joe Hand was granted, by the copyright owner, the exclusive right to license, display, distribute publicly, and authorize the public exhibition of a mixed martial arts event that is the subject of this proceeding: *UFC 241: Daniel Cormier v. Stipe Miocic 2*, including all undercard bouts and commentary (the "Work"), which was broadcast live via pay-per-view on August 17, 2019, for businesses such as the Respondents' restaurant. (Dkt. 1) (license agreement); Hand Decl. ¶ 3.

The copyright for the Work was registered by the copyright owner, Zuffa, LLC (Reg. No. PA0002207919), for a "motion picture." (Dkt. 1) (registration attachment). The effective date of registration is October 21, 2019, and the

registration states that the Work was published on August 17, 2019, such that the Work was registered within three months of its initial publication. *Id.*

On January 1, 2019, Zuffa, LLC entered into a license with Joe Hand, granting Joe Hand the “sole and exclusive third party license” “to distribute and authorize the public display” of the Work “in the Market Territory,” which is defined as the entirety of the United States. (Dkt. 1) (license attachment). The license further stated that Joe Hand “shall be the sole and exclusive third party distributor of non-residential distribution of the [Work] to commercial establishments on a closed-circuit basis” (with limited exceptions not relevant here). *Id.* See also Hand Decl. ¶ 3.

The Village is the owner of a commercial establishment in Lakeview, Oregon, called Indian Village Restaurant & Lounge. (Dkt. 1); Hand Decl. ¶ 10.

According to Joe Hand, Respondents Brittany R. Havely, Roger A. Singleton, Joe Havely, and Lorene A. Singleton are individuals who reside in Oregon and were each a member, manager, officer, and/or principal of The Village. (Dkt. 1). See also Hand Decl. ¶ 10. Lorene A. Singleton is named as The Village’s “Organizer” and registered agent in its articles of organization, as well as The Village’s registered agent in its 2019 Amended Annual Report. (Dkt. 41 & 51). Roger A. Singleton and Brittany Havely are listed as “Managers” in the same documents. *Id.* Posts on the individual respondents’ Facebook pages also suggest they were owners of The Village or had some relationship with The Village or Indian Village Restaurant at or around the time of the alleged infringement. (Dkt. 45, 47, & 49-50). However, Joe Hand has provided no evidence showing that any of the individual respondents had any direct involvement with the alleged infringement.

No payment was made to Joe Hand for a license or permission for The Village to receive and show the Work to its customers, and Joe Hand neither authorized The Village to show the Work at Indian Village Restaurant nor notified The Village’s cable or satellite provider to unblock the Work. Hand Decl. ¶¶ 11-14. Despite this, The Village advertised on its Facebook page that it would be showing the Work to its customers live on the night of August 17, 2019. (Dkt. 37).

Joe Hand has a nationwide program to police whether establishments showing Joe Hand events have a proper license. *Id.* ¶¶ 4-5. It retains auditors and enforcement personnel who have access to a list of authorized commercial establishments. *Id.* ¶ 6.

One person who performs audits on behalf of Joe Hand is Jonathan A. Teague. At 7:50 p.m. on August 17, 2019, the date of the official broadcast of the Work, Mr. Teague entered Indian Village Restaurant. UFC Piracy Affidavit of Jonathan A. Teague (Dkt. 35). Mr. Teague ordered a beer and watched two fights on the undercard of the Work at the restaurant. *Id.* In his affidavit, he describes the bartender and a manager, but does not list their names. *Id.* Mr. Teague's affidavit attaches photographs of the outside of Indian Village Restaurant, as well as inside the restaurant while it was showing the Work. *Id.* Joe Hand's party statement also provided videos Mr. Teague took via a Dropbox link. Default Direct Party Statement at 4 n.1 (Dkt. 32). Mr. Teague states that he observed the Gabriel Benitez vs. Sodiq Yusuff fight and the Yoel Romero vs. Paulo Costa fight on Indian Village Restaurant's two large television sets. (Dkt. 35).² Mr. Teague described certain details of the restaurant, including the bar, tables, and flooring, and described the Work being shown, including the appearance and action of the fighters. *Id.* He took three head counts during his time at Indian Village Restaurant, and each time the count was approximately 12 people. *Id.* Mr. Teague opines that the approximate capacity of Indian Village Restaurant is 80-90 people. *Id.*

Based on Joe Hand's rate card, the price for a commercial establishment having a fire code occupancy of anywhere from 0 to 50 people to show the Work was \$866, with the rate rising to \$980 for a fire code occupancy of 51-75, and \$1,095 for a fire code occupancy of 76-100. Rate Card (Dkt. 36).

Claimant is seeking statutory damages for the alleged infringement of the Work and requests an award of \$4,380, representing an amount four times the \$1,095 rate, given that Mr. Teague estimated the occupancy of the restaurant was 80 to 90 people. Default Direct Party Statement at 9 (Dkt. 32). Claimant also requests an award of costs and attorneys' fees. *Id.* at 10-11.

² The Board can see from its own review of the official UFC website, www.ufc.com/event/ufc-241, that the Benitez-Sodiq and Romero-Costas fights were on the undercard of *UFC 241: Daniel Cormier v. Stipe Miocic 2*. However, Claimant is cautioned to provide specific evidence with its papers in future cases where its investigator views an undercard fight, rather than the main event, to show that such fight is part of the allegedly infringed work.

III. Copyright Infringement

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). Claimant submitted Certificate of Registration PA0002207919 for the Work, which was effective as of October 21, 2019, and which states that the Work was published on August 17, 2019. A certificate of registration, if timely obtained, is prima facie evidence both that a copyright is valid and of the facts contained in the certificate, including that the registrant owns the copyright. *See* 17 U.S.C. § 410(c); *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 186 (2d Cir. 2012); *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 688 (4th Cir. 1992). Claimant has submitted evidence that Zuffa, LLC, the registrant, granted an exclusive license to distribute and authorize the public performance of the Work. (Dkt. 1) (license attachment); Hand Decl. ¶ 3. Accordingly, the Board need only consider whether Respondents infringed the Work.

Respondents did not have permission from Claimant to show the Work in Indian Village Restaurant. In this proceeding, Claimant has submitted direct evidence of acts of infringement through a witness statement. Given the credible witness testimony that The Village showed the Work without permission to Indian Village Restaurant’s customers at the time of the event, and evidence that it advertised beforehand that it would show the Work, the Board finds that infringement by The Village has been shown. Such activity constitutes an unauthorized public performance of the Work in violation of 17 U.S.C. § 106(4). *See Spanski Enterprises v. Telewizja Polska, S.A.*, 883 F.3d 904, 910 (D.C. Cir. 2018); *Joe Hand Promotions, Inc. v. Griffith*, 49 F.4th 1018, 1024 (6th Cir. 2022).

However, the Board has determined that Claimant has produced no evidence that could lead to a finding of individual liability on the part of respondents Brittany R. Havely, Roger A. Singleton, Joe Havely, or Lorene A. Singleton.

Beyond conclusory and clearly boilerplate allegations in the Claim that each of the individual respondents was a “member, manager, officer and/or principal of the entity owning and operating the Establishment on the date of the Program,” and “had a right and ability to supervise the activities of the Establishment on the date of the

Program and had an obvious and direct financial interest in the activities of the Establishment on the date of the Program” (Dkt. 1), Claimant offers no information linking these respondents to the infringement.

There are no facts alleged in the claim or in any submitted evidence—despite the Board giving Claimant additional time to submit such evidence—to suggest what, if anything, these respondents did to advance the infringement. There are no facts alleged in the claim or in any submitted evidence for the Board to conclude that they had a right and ability to control the infringement or a direct financial interest in the infringing activities. It is unknown whether any of the individual respondents were in the restaurant on the night of the infringement or managed the day-to-day activities of the restaurant in any way. In fact, other than the conclusory allegations in the Claim mentioned above, the only mentions of the individual respondents in the Claim or in the evidence submitted are through the attachment of: (1) the Articles of Organization of The Village Restaurant LLC (Dkt. 41), stating that Lorene A. Singleton is the company’s “registered agent” and “organizer,” and that Roger A. Singleton and Brittany Havelly are “manager[s]”; (2) a 2019 two-page Amended Annual Report (Dkt. 51), also stating that Lorene A. Singleton is the company’s “registered agent,” and that Roger A. Singleton and Brittany Havelly are “manager[s]”; and, (3) printouts of the individual respondents’ Facebook pages (Dkt. 45, 47, & 49-50), suggesting they were either owners of The Village or had some relationship with The Village or Indian Village Restaurant at or around the time of the alleged infringement.

The application of individual vicarious liability requires that the claimant come forward with facts to prove that the individual in question “has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity.” *Erickson Productions, Inc. v. Kast*, 921 F.3d 822, 829 (9th Cir. 2019) (*quoting VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 745 (9th Cir. 2019)). “The essential aspect of the ‘direct financial benefit’ inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps.” *Id.* (*quoting Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)). *See also Universal Furniture Int’l, Inc. v. Frankel*, 538 Fed. Appx. 267, 272 (4th Cir. 2013) (*quoting Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 513 (4th Cir. 2002)).

Mere boilerplate allegations that an individual is one of the “members, managers, officers and/or principals of the entity owning and operating the Establishment,” or even actually showing that an individual is one of the owners, without more, is not enough to prove vicarious liability. *See, e.g., J & J Sports Productions, Inc. v. Walia*, No. 10-5136 SC, 2011 WL 902245, at *3 (N.D. Cal. Mar. 14, 2011) (applying the copyright vicarious liability standard, and stating that to establish that “officers and shareholders have the right and ability to supervise a corporation's infringing activities,” one must show that “they are a moving active conscious force behind the [company's] infringement”) (citation omitted).

Such allegations are often not even enough to survive a motion to dismiss. *See Netbula, LLC v. Chordiant Software, Inc.*, No. C 08-00019 JW, 2009 WL 750201, at *2 (N.D. Cal. Mar. 20, 2009) (granting a motion to dismiss because “bare allegations that an individual was a corporate officer or member of a company's board of directors are insufficient.” Such allegations fail both parts of the vicarious liability standard because: as to financial interest, “[t]here must be an *obvious and direct* financial interest in the exploitation of copyrighted materials. The mere fact that a defendant is an officer and shareholder of an infringing corporation is too attenuated to show a direct financial interest in the exploitation of copyrighted materials”; and, as to control, control cannot be general control, but rather, a “plaintiff must allege that the defendant had supervisory power over the infringing conduct itself”) (citations omitted) (emphasis in original). *J&J Sports Productions, Inc. v. Mayreal II, LLC*, 849 F. Supp. 2d 586, 590-91 (D. Md. 2012) (comparing many vicarious liability cases under a similar standard and dismissing individual defendants who did not have “personal knowledge of, or the ability to supervise and control, the alleged unlawful interception of the Program. For instance, there is no allegation that the individual defendants were present at the nightclub when the Program was shown, that they personally authorized the interception and display of the Program, or that they authorized advertisements for the display of the Program or the imposition of a cover charge to profit from the display.”). *Cf.* ORS 63.165(1) (“A member or manager is not personally liable for a debt, obligation or liability of the limited liability company solely by reason of being or acting as a member or manager.”); *Cortez v. Nacco Material Handling Group, Inc.*, 356 Or. 254, 280 (2014) (“ORS 63.165 immunizes members and managers of an LLC from vicarious liability for the debts, obligations, and liabilities of that LLC. LLC members

and managers, however, remain personally liable for their acts and omissions to the extent those acts or omissions would be actionable against the member or manager if that person were acting in an individual capacity.”).

Joe Hand is not a stranger to the default context in federal court with regard to both copyright cases and cases relating to the unlawful interception of cable and satellite signals. As such, Joe Hand is aware that more is required. *See, e.g., Joe Hand Promotions, Inc. v. Up at Night LLC*, No. GJH-21-580, 2023 WL 375188, at *2-3 (D. Md. Jan. 23, 2023) (default cannot be granted against an officer, director, shareholder, member or principal of the company without facts showing that the individual had the ability to supervise the activity and a direct financial benefit); *Joe Hand Promotions, Inc. v. Bowers*, No. 1:18-CV-3859-MHC, 2020 WL 4557072, at *3 (N.D. Ga. Feb. 25, 2020) (referring to a prior order denying Joe Hand’s motion for default judgment in which “the Court specifically described that the Complaint was deficient because it lacked factual allegations regarding the level of authority or control that Bowers had in sanctioning the airing of the Program”); *Joe Hand Promotions, Inc. v. Sharp*, 885 F. Supp. 2d 953, 957 (D. Minn. 2012) (awarding summary judgment to individual defendant on similar grounds); *Joe Hand Promotions, Inc. v. Murray*, No. 5:15-cv-5631, 2016 WL 3903205, at *4-5 (E.D. Pa. July 18, 2016) (denying a Joe Hand motion for summary judgment on similar grounds).

In cases where Joe Hand was granted a default judgment against an individual defendant, additional facts were typically presented, such as documents showing the individual’s position and control or allegations and evidence that the individual was present at the establishment on the night of the event. *See Joe Hand Productions, Inc. v. Yakubets*, 3 F. Supp. 3d 261, 292-301 (E.D. Pa. 2014) (analyzing cases and adopting the copyright standard for vicarious infringement in an unlawful interception of cable signals case; holding that conclusory statements that one has ownership of or an officer role at a company is not enough to establish liability in default, but also finding that just enough evidence was presented); *Joe Hand Promotions, Inc. v. Disla*, No. 19-CV-788, 2020 WL 2572268, at *3 (E.D.N.Y. Feb. 3, 2020) (accepting allegation that individual was present on night of event).

Given the lack of evidence to establish individual liability, the Board’s proposed determination is to dismiss the claim against Brittany R. Havely, Roger A. Singleton, Joe Havely, and Lorene A. Singleton without prejudice.

IV. Defenses

When reviewing the evidence provided by a claimant in support of the claim, the Board must consider whether defaulting respondents have a meritorious defense. 37 C.F.R. § 227.3(a). The Board has considered the facts and finds that no such defense exists to this claim for respondent The Village.

V. Damages

Claimant requests statutory damages. Before the Board, the maximum award of statutory damages in a standard-track claim 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). The Work appears to have been registered timely, and the statutory maximum is \$15,000.

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 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)³ statutory damages 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

³ Claimant devotes a section of its party statement to “Respondents’ willful infringement” (Dkt. 32, at 5-6) and, in making its case on damages, refers to Respondents’ alleged “deliberate indifference toward copyright laws.” *Id.* at 7-8. However, “[t]he Copyright Claims Board may not make any finding that, or consider whether, the infringement was committed willfully in making an award of statutory damages.” 17 U.S.C. § 1504(e)(1)(A)(ii)(III).

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 sub nom. 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) (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).

Across the country, courts typically award statutory damages in a range from approximately two to six times the lost licensing fee for the infringed work, with around three times the lost fee being most prevalent. *See, e.g., Barcroft Media, Ltd. v. Coed Media Group, LLC*, 297 F. Supp. 3d 339, 359 (S.D.N.Y. Nov. 2, 2017); *Broadcast Music, Inc. v. Paden*, No. 5:11-02199-EJD, 2011 WL 6217414, at *5 (N.D. Cal. Dec. 14, 2011); *Sixx Gunner Music v. The Quest, Inc.*, 777 F. Supp. 2d 272, 274 (D. Mass. 2011); *Broadcast Music, Inc. v. Amici III, Inc.*, No. 14-CV-5002, 2014 WL 7271915, at *1 (D.N.J. Dec. 16, 2014); *Broadcast Music, Inc. v. Eatnout, LLC*, No. 2:15cv254, 2015 WL 12803458, at *3 (E.D. Va. Dec. 29, 2015); *Philpot*, 343 F. Supp. 3d at 702; *Broadcast Music, Inc. v. Ken V, Inc.*, 159 F. Supp. 3d 981, 990 (E.D. Mo. 2016); *Minden Pictures, Inc. v. Buzznick, LLC*, No. 2:22-cv-00369-RJS-CMR, 2023 WL 2243177, at *5 (D. Utah Feb. 27, 2023); *Broadcast Music, Inc. v. Entertainment Complex, Inc.*, 198 F. Supp. 2d 1291, 1296 (N.D. Ala. 2002); *MOB Music Publishing v. Zanzibar on the Waterfront, LLC*, 698 F. Supp. 2d 197, 207-08 (D.D.C. 2010).

In this proceeding, Claimant has provided the Board with evidence regarding how much The Village should have paid to license the Work in its establishment. This event had a rate card that designated exactly how much a restaurant with various fire capacities should pay. Based on Joe Hand's rate card, the price to show the Work in a commercial establishment with a fire code occupancy of up to 50 people was \$866, with the rate rising to \$980 for a fire code occupancy of 51 to 75, and \$1,095 for a fire code occupancy of 76 to 100. (Dkt. 36). Claimant is seeking statutory damages for the infringement of the Work and requests \$4,380, representing an amount four times the \$1,095 rate, based on Mr. Teague's estimate that the restaurant's capacity was 80 to 90 people. Default Direct Party Statement at 9.

The Officers have some disagreement as to how much, if any, weight should be given to an investigator statement that approximates the capacity of an establishment in place of the official fire capacity. However, regardless of the weight given, from no weight to fully weighting the approximation as fact, the resulting difference in base rate is small: \$866-\$1095. Given that small discrepancy and that multipliers of actual damages also fall into a

range and are not an exact science, the Board proposes an award to Joe Hand of \$3,300, an amount that represents three to four times the rate The Village should have paid regardless of the base rate used.

Awarding damages between three and four times Joe Hand's lost license fee for the infringed work in this case is appropriate to deter The Village and others from using these types of works without paying the appropriate license fees. It is reasonable to assume that Claimant's business, including Claimant's continued licensing to its existing customers, depends in part on its enforcement of copyright, because few restaurants will pay for an event if the competitor next door advertises the same event for free with impunity. *See* Hand Decl. ¶¶ 4, 17-18. There is no evidence that Claimant's primary income is litigation, but rather that litigation is used to remedy the erosion of its customer base and to appease its existing customer base. *See id.*

Based on the record before it, the Board awards \$3,300, which is between three and four times the amount of the proven actual damages of Joe Hand.

Finally, Claimant requests its attorney's fees and costs. Default Direct Party Statement at 10-11. Such fees and costs are not permitted in Board proceedings under 17 U.S.C. § 1504(e)(3), unless there is a specific finding of bad-faith conduct by the respondents under 17 U.S.C. § 1506(y)(2). There has been no such finding.

VI. Conclusion

The Board's proposed default determination is to dismiss the claim against Brittany R. Havelly, Roger A. Singleton, Joe Havelly, and Lorene A. Singleton without prejudice and to find that The Village has committed copyright infringement and award Joe Hand \$3,300 in statutory damages.