



COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0046
January 24, 2024

Mary A. Oakes

CLAIMANT

v.

Heart of Gold Pageant System Inc.
and Angel Jameson

RESPONDENTS

FINAL DETERMINATION

On December 21, 2023, the Copyright Claims Board (Board) issued the below Proposed Default Determination. The Claimant alleged infringement of two images, one described as the “Michaela Ad Image” and one described as the “Abby Image.” The Proposed Default Determination found that both respondents Angel Jameson (“Jameson”) and Heart of Gold Pageant System Inc. (“Heart of Gold”) infringed the Michaela Ad Image, and that only Heart of Gold infringed the Abby Image. It proposed an award of \$4,500 in statutory damages, of which \$2,250 was awarded jointly and severally against both Respondents and \$2,250 was awarded solely against Heart of Gold. Finally, it proposed dismissing without prejudice the Abby Image claim against Jameson. The Proposed Default Determination and a Notice of Proposed Default Determination were sent via mail to the addresses on file for Angel Jameson and Heart of Gold Pageant System Inc., and a Notice Regarding Dismissal in Proposed Default Determination addressed to the Claimant was issued. More than thirty days have passed, and none of the parties have responded to the Notices. Therefore, pursuant to 17 U.S.C. § 1506(u)(4), 37 C.F.R. § 227.3(a)(2), and 37 C.F.R. § 227.3(c), the Board issues the below Proposed Default Determination as a Final Determination. The Board finds Jameson and Heart of Gold liable for copyright infringement of the Michael Ad Image, and Heart of Gold liable for copyright infringement of the Abby Image, and awards Mary A. Oakes \$4,500 in statutory damages as described above. The claim against Jameson for infringement of the Abby Image is dismissed without prejudice.

* * * * *

Respondents, Heart of Gold Pageant System Inc. (“Heart of Gold”), a Texas corporation, and Angel Jameson (“Jameson”) (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 shall require the claimant to submit written direct testimony. 17 U.S.C. § 1506(u)(1); 37 C.F.R. § 227.2(a). The claimant, Mary A. Oakes (“Claimant” or “Oakes”), 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 the presented evidence is sufficient to support a finding in favor of Oakes against both Respondents with respect to one of the two photographs at issue, the “Michalea Ad Image”, and to support a finding against Heart of Gold with respect to the other photograph, the “Abby Image.” The Board also finds that the presented evidence is insufficient to support a finding of infringement against Jameson for the Abby Image and dismisses the claim against Jameson related to the Abby Image without prejudice.¹ Accordingly, the Board awards \$4,500 in damages, of which \$2,250 is awarded jointly and severally against both Respondents and \$2,250 is awarded solely against Heart of Gold.

Respondents now have thirty days, ending on January 22, 2024, from the issuance of this proposed default determination to submit any evidence or information in opposition to the proposed default determination. *Id.* A copy of this proposed default determination will be sent to Respondents at all postal and email addresses reflected in the record. *Id.* If Respondents submit an opposition, the Board will evaluate any materials submitted by them before issuing a final determination. *Id.* § 1506(u)(3). If Respondents do not submit a response, the Board will issue this default determination as a final determination. *Id.* § 1506(u)(4). **Any determination against either or both Respondents, including a monetary award for damages, will be enforceable in a court of law.**

Claimant now also has thirty days, ending on January 22, 2024, 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 the claim against Jameson for the alleged

¹ Dismissals in default cases are without prejudice because the applicable regulations provide: “If the Board determines that the evidence is insufficient to support a finding in favor of the claimant or counterclaimant, the Board shall prepare a proposed determination dismissing the proceeding without prejudice and shall provide written notice of such proposed determination to the claimant or counterclaimant.” 37 C.F.R. § 227.3(a)(2).

infringement of the Abby Image. 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 proceeding was initiated when Oakes filed a claim on July 7, 2022. Claim (Dkt. 1). Oakes filed an amended claim on August 22, 2022. Amended Claim (Dkt. 7). The Board found the amended claim compliant and, on October 6, 2022, directed Oakes to serve Respondents within ninety days. (Dkt. 8). Oakes filed Proofs of Service on October 25, 2022, which affirmed that on October 10, 2022, Jameson was served by hand delivery and Heart of Gold was served by hand delivery to Jameson, an officer, managing or general agent, or other agent of Heart of Gold authorized by appointment or by law to receive service of process in an action brought in Texas, where service was made. (Dkt. 13-14). The Board sent Second Notices to Heart of Gold and Jameson by mail and email on November 10, 2022. (Dkt. 15-16). The Board did not receive an opt-out form from either respondent.

On December 13, 2022, the Board notified the parties that the proceeding had entered the “active phase” because Respondents did not submit a timely opt-out, and it ordered Oakes to pay the second filing fee and Jameson and Heart of Gold to register for the Board’s online docketing system (eCCB). (Dkt. 17). On January 13, 2023, the Board issued a Scheduling Order (Dkt. 23) and a Second Notice for Jameson and Heart of Gold to register for eCCB. (Dkt. 24). The Board issued all of the foregoing orders through eCCB and also mailed and emailed them to Respondents. Neither respondent registered for eCCB.

In the Scheduling Order, Respondents were ordered to submit responses by February 13, 2023, but they did not. Both parties were also ordered to attend a pre-discovery conference to be held on February 23, 2023. While Oakes and her counsel attended the initial conference, neither respondent did, despite the Board sending the Zoom link to the email address on file for Respondents on February 17, 2023. At multiple points in this procedural history, Jameson has contacted the CCB, and after communicating with staff, has affirmed each time her intent to not participate in this proceeding. Jameson initially contacted the Board in response to this Zoom link, expressing her

disbelief that the Board is a government tribunal. CCB staff responded, clarifying its role, providing further resources, and emphasizing that a finding of liability could be made against her.

On March 2, 2023, the Board issued its First Default Notice because neither Jameson nor Heart of Gold had met any of the mandatory deadlines set by the Board. (Dkt. 25). The First Default Notice gave Respondents until April 3, 2023, to file a response and register for eCCB. *Id.* Jameson then sent another email in response to the First Default, requesting an “official day in court.” CCB staff again responded, emphasizing that Jameson was subject to a binding legal proceeding, providing options for participating in the proceeding, and reiterating that a default could result in a legally binding judgment against her. In a subsequent call with CCB staff in March, Jameson indicated that she would not participate. On March 20, 2023, the Board issued its Second Default Notice, which reminded Respondents of the April 3, 2023, deadline. (Dkt. 26). These notices were issued using the same contact procedure described above.

Jameson and Heart of Gold failed to file responses or register for eCCB by April 3, 2023. Accordingly, on April 11, 2023, the Board ordered Oakes to submit written direct testimony in support of a default determination. (Dkt. 27). Oakes submitted the required written materials on May 26, 2023, consisting of a party statement, declarations of Oakes and her counsel, an evidence list, and evidence. (Dkt. 28-42).

Pursuant to 37 C.F.R. § 227.2(b), on July 6, 2023, the Board issued an order (“July 6 Order”) in which it requested additional evidence and information from Oakes to be provided by July 18, 2023. (Dkt. 43). The order noted that Oakes had provided no evidence to show that Jameson had any personal involvement related to the alleged infringement of one of the works (the Abby Image), and it invited Oakes to submit additional evidence or witness statements to show that Jameson should be held individually liable for infringement of that work. *Id.* The order also requested additional information regarding damages, noting that invoices submitted as evidence of damages and the description of what the invoices covered did not allow the Board to fully understand whether they were relevant to the main issue in determining actual lost licensing fees: what Claimant would have charged Respondents to license the individual photographs at issue for the use of the works made by Respondents. In the order, the Board gave Oakes the opportunity to submit additional evidence or witness statements to (a) show why

the invoices already submitted were relevant to damages or (b) present additional licenses, including information regarding the subject matter and terms of the licenses. *Id.* Oakes submitted additional evidence on August 1, 2023. (Dkt. 46).

On October 6, 2023, the Board issued an order scheduling a hearing to take place on November 1, 2023, and permitting Oakes to submit any additional licenses and related material that she wished the Board to consider in determining damages. (Dkt. 47). Oakes did not submit any additional material in response to the order, but she testified at the November 1 hearing, represented by counsel. All three Copyright Claims Officers participated in the hearing. Shortly after the order scheduling the hearing, Jameson contacted the U.S. Copyright Office's Public Information Office, who placed her in contact with CCB staff. In a follow-up call, CCB staff again explained the proceeding and Jameson again affirmed that she would not participate in the proceeding.

II. Factual History

Oakes is a Texas-based professional photographer and graphic designer. A significant amount of her photography involves taking portraits of graduating high school seniors and offering photography and design work for participants in beauty pageants. Declaration of Mary A. Oakes ("Oakes Decl.") (Dkt. 31) ¶¶ 3-4. She retains the copyright to all photographs and design works that she creates. *Id.* ¶ 5. She also has licensed some of her photographs and designs to publications and business entities for editorial and commercial uses, and she typically does not allow third parties to use her copyrighted works without the payment of a licensing fee. *Id.* ¶¶ 6-7.

Two of Oakes' works are at issue in this proceeding. In 2018, Oakes created the Michalea Ad Image, an advertisement for her photography business, Exhibit A (Dkt. 37), that incorporated two photographs she had previously taken of a beauty pageant participant named Michalea. Oakes Decl. (Dkt. 31) ¶¶ 8-9. She subsequently registered a copyright in the Michalea Ad Image, securing copyright Reg. No. VA 2-261-694 with an effective date of July 20, 2021. Exhibit B (Dkt. 39); Oakes Decl. ¶¶ 10-11. The certificate of registration states that the date of first publication was August 31, 2018. In 2020, she took a photograph (the Abby Image) (Ex. C; Dkt. 35) of a graduating high school senior named Abby. Oakes Decl. (Dkt. 31) ¶ 12. She subsequently registered a copyright in

the Abby Image, securing copyright Reg. No. VA 2-264-881, with an effective date of July 20, 2021. *Id.* ¶¶ 14-15; Ex. D (Dkt. 30). The certificate of registration states that the date of first publication was August 6, 2020. (Dkt. 30). In this Determination, the Michalea Ad Image and the Abby Image are referred to collectively as the “Images.”

In 2021, Oakes discovered that the Abby Image had been incorporated into marketing materials posted on the website of Heart of Gold in connection with an event it had sponsored. Oakes Decl. ¶¶ 16-17, 22; Exhibits E & H (Dkt. 34 & 36). Claimant also discovered (but does not state when she discovered)² that Heart of Gold had incorporated the Michalea Ad Image into a video posted on its Facebook page and YouTube Channel. Oakes Decl., ¶¶ 19-21; Exhibit F (Dkt. 29). The Michalea Ad Image was also included in marketing materials for Heart of Gold appearing on Jameson’s personal Facebook page. Oakes Decl. ¶¶ 22, 25; Exhibits G & H (Dkt. 42 & 36). According to a Franchise Tax Account Status and Public Information Report for Heart of Gold obtained by Oakes from the Texas Secretary of State, Jameson is the Board President, Secretary, and Treasurer, and a Director of Heart of Gold. Declaration of Ryan E. Carreon (“Carreon Decl.”) (Dkt. 32) ¶ 3; Exhibit K (Dkt. 40).

Oakes states that it appears that Respondents began using the Michalea Ad Image as early as January 2020 and the Abby Image as early as July 2021. Oakes Decl. ¶ 33. Those dates are consistent with the evidence she has submitted of Respondents’ use: the Michalea Ad Image appears on posts on Jameson’s Facebook page dated January 21, 2020, January 31, 2020, and May 15, 2020 promoting Heart of Gold; and the Abby Image appears on the usaheartofgold.com website where the Image is named “IMG-~~20210704~~WA0014-1.jpeg.”³ (Dkt. 36, 42) (emphasis added). Oakes states that as of the date of her declaration (May 26, 2023), her Images had not been removed from the Heart of Gold website or social media accounts. Oakes Decl. ¶ 24. She does not specifically state whether the Images continued to appear on Jameson’s Facebook page, but does state that “[i]t appears that both images have been continuously used by Respondents in various capacities since that time --- three years for the

² Oakes does not state that her registrations occurred before infringement, and the fact that Oakes submitted her applications to register the copyrights in the Michalea Ad Image and the Abby Image on July 20, 2021, almost 3 years after first publication of the Michalea Ad Image and almost a year after first publication of the Abby Image (*see* Exhibits. B & D (Dkt. 39 & 30), suggests that she filed the applications because she was aware of the infringements.

³ While the numerical sequence “20210704” is consistent with a use by Respondents in July 2021, it is not necessarily probative of a use at that time. The Image was used in connection with an advertisement for a Heart of Gold “Diamonds & Gold” event to take place on Sunday, March 27, 2022, eight months after July 2021. As noted above, July 2021 is when Oakes submitted her copyright registration applications for the two Images.

Michalea Ad Image and two years for the Abby Image.” *Id.* ¶ 34.

Oakes has never granted a license or permission to Heart of Gold or Jameson to use her Images. *Id.* ¶ 23.

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 [plaintiff’s] work that are original.” *Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Oakes submitted Certificate of Registration VA 2-261-694, with an effective date of registration of July 20, 2021, for the Michalea Ad Image and Certificate of Registration VA 2-264-881, also with an effective date of registration of July 20, 2021, for the Abby Image. A certificate of registration, if issued before or within five years after first publication of a work, 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); *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 141 (5th Cir. 2004). Both Images were first published within five years before the effective dates of registration. Accordingly, the Board need only consider whether Respondents 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. *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007). If the works are strikingly similar, access can be inferred. *See Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 395 (5th Cir. 2001). In photographic copyright infringement cases, courts commonly find striking similarity when the plaintiff’s and defendant’s photographs are virtually identical. *See Playboy Enterprises, Inc. v. Webbworld Inc.*, 991 F. Supp. 543, 551 (N.D. Tex. 1997) (finding striking similarity, and therefore copying, when allegedly infringing images were “virtually identical” to allegedly infringed images); *Norrell v. Does*, No. 1:23-CV-00238-RP, 2023 WL 5803706, at *4 (W.D. Tex. Sept. 6, 2023) (same). And 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 *Nimmer on Copyright* § 13.03(A)(1)); *see BVE Brands, LLC v. Yiwu Dingyi E-Commerce Co.*, 2022 U.S. Dist. LEXIS 184682, *13 (W.D. Tex. 2022).⁴

⁴ Moreover, in a video that it posted on Facebook, Heart of Gold reproduced an advertisement for Oakes’ photography services that featured the Michaela Ad Image, including the name “OAKES” in large red letters, Oakes’ telephone number, and the URL WWW.MARYOPHOTOGRAPHY.COM, the website of Oakes’ photography business. (Dkt. 36 at 7-8).

Oakes has demonstrated that, without her consent, Heart of Gold reproduced and publicly displayed exact copies of her Images on its commercial website. There is no question that the Images are identical to the corresponding photos on the Heart of Gold website and are thus both strikingly and substantially similar. The Board concludes that Heart of Gold infringed the copyrights in both the Michalea Ad Image and that Abby Image.

Oakes has also submitted sufficient evidence that Jameson infringed the copyright in the Michalea Ad Image. The posting of that image on Jameson's Facebook page is sufficient evidence of Jameson's personal involvement in its infringement.

However, Oakes has submitted no evidence that Jameson was personally involved in the infringement of the Abby Image. Oakes has stated that she is informed and believes that Heart of Gold is owned and operated by Jameson (Oakes Decl. ¶ 18), but such information and belief is not evidence. Exhibit K, the Texas Franchise Tax Account Status and Public Information Report for Heart of Gold Pageant System Inc., which indicates that Jameson is Board President, Secretary, Treasurer, and a Director of Heart of Gold, is evidence of her status as an officer and director of the corporation, but it does not establish that she had any involvement in Heart of Gold's infringement of the Abby Image.

The Board's July 6 Order observed that "the claimant has provided no evidence to show that Jameson had any personal involvement related to use of the Abby Image" and gave Claimant additional time to "submit any additional evidence or witness statements to show that Angel Jameson should be held individually liable for the alleged infringement of the Abby Image." (Dkt. 43). In response, Jameson submitted no additional evidence but argued that because Jameson is in default and the claim "has specifically alleged that Jameson was personally responsible for infringing both images," the Board should apply the standard sometimes applied in federal court and deem the party's default to be a concession of all well-pleaded allegations. Supplemental Response (Dkt. 46) at 1.

However, the CASE Act, which established the Board, provides a different procedure when a party has defaulted. It requires the claimant to supply evidence rather than merely rely on unsubstantiated allegations in the claim. 17 U.S.C. § 1506(u)(1) ("The Copyright Claims Board shall require the claimant to submit relevant evidence

and other information in support of the claimant's claim and any asserted damages and, upon review of such evidence and any other requested submissions from the claimant, shall determine whether the materials so submitted are sufficient to support a finding in favor of the claimant under applicable law and, if so, the appropriate relief and damages, if any, to be awarded." Claimant has not provided such evidence.

Oakes' response to the July 6 Order also argued that Jameson may be held vicariously liable for the infringement of the Abby Image, noting that vicarious liability may lie against an individual even when acting in the capacity of an officer or agent of a corporation. (Dkt. 46, at 2) (citing *Sanchez v. Hacienda Records & Recording Studio, Inc.*, 2013 WL 529950, at *8 (S.D. Tex. Feb. 11, 2013)). She further argued that a corporate officer can be held vicariously liable for copyright infringement where she: (1) profits from the infringement, and (2) has a right and ability to supervise the direct infringer. (Dkt. 46, at 2) (citing *Broadcast Music, Inc. v. CDZ, Inc.*, 724 F. Supp. 2d 930, 935 (C.D. Ill. 2010)). The standard enunciated in *Broadcast Music* is a somewhat attenuated version of the more standard formulation that to establish vicarious liability, one must show that the defendant had a "right and ability to supervise that coalesced with an obvious and direct financial interest in the exploitation of copyrighted materials." *Softel, Inc. v. Dragon Med. & Sci. Commun.*, 118 F.3d 955, 971 (2d Cir. 1997) (quoting *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)).

However, the only assertion Claimant makes in support of the application of vicarious liability to Jameson are that Jameson is the owner and director of Heart of Gold, from which she argues that Jameson clearly had the ability to supervise and control marketing associated with the business and that Jameson stood to profit from the revenues generated by the infringing advertisement. The Board notes that there is no evidence that Jameson is the "owner" of Heart of Gold, and while she may well be the sole shareholder of the corporation, no evidence to that effect has been submitted. Thus, Jameson's liability, if any, must be predicated on her position as an officer and director of Heart of Gold. But as the court concluded in *Softel*, "the only evidence that Softel adduced prior to the court's ruling relating to the issue of Hodge's supervisory capacities and financial interests was that Hodge was the president of Dragon and a shareholder. The evidence is too attenuated to establish a sufficiently 'direct' financial interest in the exploitation of copyrighted materials." *Id.* at 971-972. See also *Netbula, LLC v. Chordiant Software, Inc.*,

2009 U.S. Dist. LEXIS 25372, *8 (N.D. Cal. 2009). Similarly, the only evidence Claimant has provided related to Jameson’s financial interests is that Jameson is an officer and director of Heart of Gold. That evidence is insufficient to support a finding of vicarious liability.

Furthermore, generalized statements that an individual is an “owner” of a business, or even actual evidence 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, under which “officers and shareholders have the right and ability to supervise a corporation’s infringing activities when they are a moving active conscious force behind the [company’s] infringement”) (citation omitted). Accordingly, the Board concludes that there is insufficient evidence to support a finding that Jameson is liable for infringement of the copyright in the Abby Image.

IV. Defenses

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

V. Damages

Oakes requests an award of \$15,000 in statutory damages – \$7,500 for each of the two infringed images. Party Statement, at 5-6. (Dkt. 41). Because the infringements allegedly commenced before the July 2021 effective dates of registration for the two Images and well over three months after the Images’ first publication, the maximum statutory damages award for each image is \$7,500. 17 U.S.C. § 1504(e)(1)(A)(ii)(II); Party Statement, at 5-6.

Courts have wide discretion to award statutory damages as long as they fall within 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 these [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); *See also Playboy Enters., Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1176 (N.D. Tex. 1997).

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) (on remand) (“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) (“[N]umerous courts have held that assessed 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; *Leland Med. Centers, Inc. v. Weiss*, No. 4:07CV67, 2007 WL 2900599, at *6 (E.D. Tex. Sept. 28, 2007). 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., Broadcast*

Music, Inc. v. Bandera Cowboy Bar, LLC, No 5:09-cv-882-XR, 2010 WL 11597871, at *2 (W.D. Tex. April 13, 2010); *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 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); *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 Publ'g v. Zanzibar on the Waterfront, LLC*, 698 F. Supp. 2d 197, 207-08 (D.D.C. 2010).

Oakes has submitted no information about any past licenses for either of the Images at issue in this proceeding. At the hearing, she explained that commercial licensing “is not the norm for my business” and that primarily, she does “commissioned work, work for hire, things like that.” Oakes Testimony at November 1, 2023 Hearing (“Hearing Tr.”) at 07:07-07:28, 08:20-08:28. However, as discussed below, she provided the Board with invoices relating to two prior licenses in 2021 and 2022 for the use of other, similar-type pageant photographs that she was commissioned to take.

Oakes did not testify or submit evidence regarding any licenses for the use of preexisting works (as opposed to works that were specially commissioned). In her Supplemental Response submitted in response to the July 6 Order requesting additional evidence and information, she noted that she maintains price listings on her website, with a one-year commercial license starting at \$5,000, but that the specific pricing depends on the usage requested. Supplemental Response (Dkt. 46) at 3. However, at the hearing she acknowledged that since she posted the price listings on her website, she had never actually been contacted about or issued such a license for any of her existing images because that was not the normal scope of her work. Hearing Tr. at 15:30-15:54. The Board concludes that the price listings are not probative of what a reasonable license fee would have been for the Images. In determining

damages for copyright infringement, courts often look to “the reasonable license fee on which *a willing buyer* and a willing seller would have agreed for the use taken by the infringer.” *Davis*, 246 F.3d at 167 (emphasis added); *MGE UPS Sys. v. GE Consumer & Indus. Inc.*, 622 F.3d 361, 366 (5th Cir. 2010). Oakes’ price list, at best, is evidence of the price at which Oakes has offered a license. It tells the Board nothing about whether any willing buyer has agreed to that price. *See Bell v. Taylor*, 827 F.3d 699, 709 (7th Cir. 2016) (concluding that “the price that Bell listed on his website is not sufficiently concrete to show the fair market value of his photo”).

Oakes also maintained that because the infringements by Respondents consisted not only of copying her Images, but also of incorporating them into advertising and marketing materials, her damages would include not only a “lost license fee” for the Images, but also the lost fee that she would have been able to charge for her design services. Supplemental Response at 3. However, she offered no argument, and the Board is aware of no authority, in support of the claim that such fees for other services may be included in an award of damages for copyright infringement. While Oakes might or might not have been engaged by Respondents to provide design services if she had licensed the use of the Images to Respondents, the loss of such income is speculative and irrelevant. Oakes is entitled to compensation, but only for the acts of infringement – i.e., the reproduction of the Images and their use in Respondents’ advertising and marketing materials.

The most reliable evidence that Oakes has submitted regarding her damages is based on two invoices relating to photographs she was commissioned to take in 2021 and 2022 for a company that operates beauty pageants in Texas. Oakes Decl. ¶¶ 26-32; Exhibits I & J (Dkt. 28 & 33). For the first invoice, the amount paid was \$12,755.16 and for the second invoice, the amount paid was \$31,975.83. *Id.* Unlike the works at issue here, which were preexisting works, the licensed images were commissioned by the licensee. Because the Images infringed by Respondents were preexisting, the factors applicable to the pricing of a license for those Images ordinarily would differ from those that apply to commissioned works. *See Baker*, 254 F. Supp. 2d at 353. Oakes testified that there was no written agreement reflecting the terms of the 2021 license but that there was an oral agreement that twelve photographs were licensed for use for one year. Hearing Tr. at 22:52-25:16. When asked what the \$12,755.16 fee was paid for, her testimony was somewhat inconsistent. She stated that she was paid for her service in taking the photos and for

some “small design work,” Hearing Tr. at 25:47-26:00, but when asked to separate out what she was paid for licensing the photographs as opposed to the service of taking the photographs, she testified that the license fee was \$12,000 and that “I didn’t charge them for the actual labor of capturing the photos,” and that she donated that service to the licensee with the fee for her design services being \$755 “and change.” Hearing Tr. at 26:24-27:11.⁵ For the 2022 pageant, the amount paid covered not only a license to use fifteen photographs, but also marketing work and, in contrast to the 2021 arrangement, Oakes’ services in taking the photographs. She could not provide exact details on the amount of the \$31,975.83 payment attributable to license fees but estimated that 25% to 50% of the \$31,975.83 payment was for her marketing work. She testified that she also donated about \$75,000 worth of additional labor. Hearing Tr. at 35:38-38:21.

Oakes’ testimony regarding the license fee the 2021 pageant was fairly clear: she charged \$12,000 for the use of twelve photographs – or \$1,000 per photograph. For the 2022 pageant, Oakes’ testimony was less clear, and any calculation of the license fee would be necessarily imprecise. One-half to three-quarters of the fee covered Oakes’ marketing work, leaving one-quarter to one-half of the fee (*i.e.*, approximately \$8,000 to \$16,000) to cover both the license fee for fifteen photographs and Oakes’ services in taking the photographs. Oakes does not provide any guidance as to the allocation of that portion of the fee. The Board therefore must assume, in the absence of any other evidence, that the breakdown of the license fee and the fee for taking the photographs was 50-50, resulting in an overall license fee of between approximately \$8,000 and \$16,000 for the 15 licensed photographs, or between \$533 and \$1,065 per work.

Based on such evidence, the path to the calculation of a “reasonable license fee” for Respondent’s Images is somewhat rocky. Taking Oakes’ testimony at face value, one might conclude that a reasonable license fee would be between \$533 and \$1,065 per photo. And there is reason not to simply choose the number at the high end of that range. As noted above, the factors applicable to the pricing of a license for commissioned images differ from those applicable to the use of preexisting images, and it is reasonable to conclude that the fee for the latter would be lower. Moreover, the lack of any documentary evidence regarding the allocations of the 2021 and 2022 fees

⁵ Oakes testified that her work for the licensed pageant included a “partial sponsorship.” Hearing Tr. at 21:50-21:59.

presents the Board with vague and sometimes inconsistent testimony regarding how much of each fee was actually paid for a license to use Oakes' photographs. Recognizing that the calculation of statutory damages is often not an exact science, the Board concludes that a reasonable license fee for each of the two infringed Images would be approximately \$750.

Following the practice described above of awarding 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, results in an award of \$2,250 per work infringed, for a total award of \$4,500.

Such an award follows the practice endorsed by many courts of awarding statutory damages that significantly exceed the amount of unpaid license fees because an 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*, 343 F. Supp. 3d at 702–03 ("Merely awarding statutory damages in the amount of the profits reaped from a copyright infringement would do little to discourage infringers.").

Awarding damages three times the reasonable licensing fees for the infringed works in this case is appropriate to deter Respondents and others from using Oakes and other photographers' works without paying the appropriate license fees. The Board finds that such an award is in line with precedent throughout the country.

Based on the record before it, the Board finds Heart of Gold liable for infringement of both Images and Jameson liable for infringement of the Michaela Ad Image. The Board awards \$4,500 in damages, of which \$2,250 is awarded jointly and severally against both Respondents and \$2,250 is awarded solely against Heart of Gold.

VI. Conclusion

The Board's proposed default determination is to find that –

- (1) Heart of Gold and Jameson are jointly and severally liable for the infringement of the copyright in the Michalea Ad Image. Oakes is awarded \$2,250 in statutory damages for the infringement of that Image.
- (2) Heart of Gold is liable for the infringement of the copyright in the Abby Image. Oakes is awarded \$2,250 in statutory damages for the infringement of that Image.
- (3) The claim against Jameson for infringement of the Abby Image is dismissed without prejudice. 37 C.F.R. § 227.3(a)(2).