COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0219
September 22, 2023

Dana Hursey	*v.*	Hakimian Global LLC
CLAIMANT		**RESPONDENT**

FINAL DETERMINATION

On August 16, 2023, the Copyright Claims Board (Board) issued the below Proposed Default Determination, proposing a finding that Respondent Hakimian Global LLC has committed copyright infringement and that Claimant Dana Hursey should be awarded $3,000 in statutory damages. The Proposed Default Determination and a Notice of Proposed Default Determination were sent via mail to the addresses on file for Hakimian Global LLC. More than thirty days have passed, and Hakimian Global LLC has not responded to the Notice of 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 finds Hakimian Global LLC liable for copyright infringement and awards Dana Hursey $3,000 in statutory damages.

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Respondent, Hakimian Global LLC ("Hakimian"), has 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, Dana Hursey ("Hursey"), 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 Hursey and awards $3,000 in statutory damages.

Hakimian now has thirty days 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 Hakimian at all postal and email addresses reflected in the record. *Id.* If Hakimian

submits an opposition, the Board will evaluate any materials submitted by Hakimian before issuing a final determination. *Id.* § 1506(u)(3). If Hakimian does not submit a response, the Board will issue this default determination as a final determination. *Id.* § 1506(u)(4). **Any determination against Hakimian, including a monetary award for damages, will be enforceable in a court of law.**

I. Procedural History

This claim was filed on October 28, 2022, and Hursey selected a smaller-claims track proceeding, which has a damages cap of $5,000. Claim (Dkt. 1). *See* 17 U.S.C. § 1506(z); 37 C.F.R. § 226.1. The Board found the claim compliant and, on November 4, 2022, directed Hursey to serve Hakimian within ninety days. (Dkt. 2). Hursey filed a Proof of Service on November 16, 2022, which affirmed that Hakimian was served on November 14, 2022 by personal service to its corporate registered agent. (Dkt. 5). The Board sent a Second Notice to Hakimian by mail and email on December 2, 2022. (Dkt. 7). The Board did not receive an opt-out form from Hakimian.

On January 17, 2023, the Board notified the parties that the proceeding had entered the "active phase" because Hakimian did not submit a timely opt-out, and ordered Hursey to pay the second filing fee and Hakimian to register for the Board's online docketing system (eCCB). (Dkt. 8). On February 9, 2023, the Board issued a Scheduling Order (Dkt. 10) and a Second Notice for Hakimian to register for eCCB. (Dkt. 11). The Board issued all of the foregoing orders through eCCB and also mailed and emailed them to Hakimian.

In the Scheduling Order, Hakimian was ordered to submit a response by March 13, 2023, but Hakimian did not. Both parties were also ordered to attend an initial conference to be held on March 29, 2023. While Hursey did attend the initial conference, Hakimian did not, despite the Board sending the Zoom link to the email address on file for respondent on March 22, 2023.

On March 17, 2023, the Board issued its First Default Notice because Hakimian did not meet any of the mandatory deadlines set by the Board. (Dkt. 12). The First Default Notice gave Hakimian another thirty days to file a response and register for eCCB. *Id.* On April 4, 2023, the Board issued its Second Default Notice, which reminded Hakimian of the April 17, 2023 deadline. (Dkt. 13). These notices were issued using the same contact procedure described above.

Hakimian failed to file a response or register for eCCB by April 17, 2023. The Board received no communication from Hakimian at all. Accordingly, on April 21, 2023, the Board ordered Hursey to submit written direct testimony in support of a default determination. (Dkt. 14). Hursey submitted the required written materials on May 8, 2023, consisting of a party statement, an evidence list, and evidence. (Dkt. 15-22).

Pursuant to 37 C.F.R. § 227.2(b), on May 22, 2023, the Board issued an order in which it requested additional evidence and information from Hursey. (Dkt. 23). The Board recognized that information related to Hursey's licensing practices, which he had testified about on May 4, 2023 in *Hursey v. Lavaca LLC*, Claim No. 22-CCB-0056, would be useful to the Board's determination in this proceeding. *Id.* Hursey submitted additional evidence on eCCB on May 25, 2023. (Dkt. 24).

II. Factual History

Hursey is a California-based photographer who offers stock photographs on his public website (stock.hursey.com) for license. Additional Evidence 052523 (Dkt. 24). Hursey owns the copyright (Reg. No. VA 2-016-014) in a photograph of a couple in athletic clothing walking on a greenery-lined path (the "Work"). Default Direct Party Statement (Dkt. 15); Evidence Doc. A (Dkt. 22); Evidence Doc. B (Dkt. 21). The Work, entitled "DH_371-4627," was registered to Hursey as a part of a group registration of 750 published photographs. (Dkt. 22). The effective date of registration is August 24, 2016, and the registration states that the group of works was published on approximately April 29, 2005. *Id.*

Hursey has testified previously about his method of creating and licensing stock photographs and how the license fee does not deviate at all based on the photograph chosen, but rather on parameters related to the use. Hearing Tr., May 4, 2023, *Hursey v. Lavaca,* No. 22-CCB-0056 ("Lavaca Hearing Tr."). As that testimony was taken in front of this Board, its authenticity is not in question. Therefore, the Board can take notice of the existence of that testimony and, while not taking judicial notice of the facts themselves, evaluate the testimony accordingly.

A potential licensee can access Hursey's stock image website, select a photograph, and choose from a drop-down menu what kind of usage they would like to purchase – website, social media and/or print, the territory of permitted usage, how large they would like the image, and the length of use. Order to Submit Additional Evidence

(Dkt. 23); Lavaca Hearing Tr. at 16:05-20:47. The fee Hursey charges to license an image corresponds not to what image is selected, but to the type, size, and length of usage selected in the drop-down menu by the licensee. Lavaca Hearing Tr. at 15:32-16:47. Hursey has testified that in the past three years, he has licensed the use of stock photographs using the same pricing model, and none of the licenses deviated from the "standard amount charged that would be on [his] website." *Id.* at 13:00-15:03; 33:00-33:34.

Hursey discovered that as early as August 9, 2020, a copy of the Work was on display on Hakimian's commercial website (https://www.flexogor.com) to market its sale of pain-relief ointment. (Dkt. 15); Evidence Docs. C & D (Dkt. 16-17). Hursey cites a Wayback Machine printout from a search done no earlier than December 14, 2020, showing Hakimian's website use of the Work on at least August 9, 2020 and December 14, 2020. (Dkt. 16). A demand letter sent from Hursey's lawyer to Hakimian, on January 26, 2022, attaches a printout apparently made on December 14, 2020 of Hakimian's website. (Dkt. 17). When in 2020 Hursey discovered Hakimian's use does not, however, change the analysis in this determination.

Hakimian, a limited liability company located in New York, was identified by Hursey or his counsel as the owner of the www.flexogor.com website. (Dkt. 15 &17). Hursey, through counsel, sent a cease and desist and demand letter to Hakimian on January 26, 2022. *Id.* After receiving no response regarding settlement, Hursey, through counsel, sent a second demand letter to Hakimian on June 17, 2022. (Dkt. 15); Evidence Doc. E (Dkt. 20). Hursey's party statement, filed May 8, 2023, stated that his Work had been removed from Hakimian's public-facing pages, but that he does not know when (although in letters of January 26, 2022 and June 17, 2022, Hursey's lawyer was still demanding that the images be taken down). (Dkt. 15, 17 & 20). When Hursey filed his claim, he also listed "unknown" for when the infringement ended. (Dkt. 1). Hursey states that the Work is still hosted in a non-public-facing "images" area of Hakimian's website. (Dkt. 24). Hursey is seeking the maximum $5,000 statutory damages permitted in a smaller claim proceeding. (Dkt. 15).

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). Hursey submitted Certificate of Registration VA 2-016-014 for the Work, which was effective as of August 24, 2016. (Dkt. 22). The Work was published in 2005. *Id.* A certificate of registration, if timely obtained, is prima facie evidence both that a copyright is valid and that the registrant owns the copyright. *See* 17 U.S.C. § 410(c); *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). However, this evidentiary presumption applies only when the certificate of a registration is obtained before or within five years after first publication of the work. 17 U.S.C. § 410(c). In this case, the effective date of registration is outside of the five-year period, so the evidentiary weight given to the registration is in the Board's discretion. *Id.*

Neither the copyrightability of the Work nor Hursey's ownership of it is in question. The photograph is creative and Hursey, a professional photographer, has provided evidence that he took the photograph. (Dkt. 15 & 21). *See Feist Publications*, 499 U.S. at 346 ("[O]riginality requires independent creation plus a modicum of creativity."); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) ("Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.").

In the absence of direct evidence, copying is proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works. *See, e.g., Boisson v. Banian, Ltd.*, 273 F.3d 262, 267-8 (2d Cir. 2001); *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007); *Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colo.*, 689 F.3d 29, 49 (1st Cir. 2012); *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d. 800, 806 (D.C. Cir. 1987). Copying can also be inferred without additional evidence of access if the allegedly infringed work and the allegedly infringing work are "so strikingly similar as to preclude the possibility of independent creation." *Lipton v. Nature Co.,* 71 F.3d 464, 471 (2d Cir. 1995) (quotation and citation omitted). *See also Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 985 (9th Cir. 2017); *JCW Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 915 (7th Cir. 2007).

In order to prove substantial similarity, the claimant must show that the allegedly infringing work is substantially similar to protectable elements of the infringed work. When "duplication is literal or verbatim, then clearly substantial

similarity exists." *Bell v. Wilmott Storage Services, LLC*, 12 F.4th 1065, 1074 (9th Cir. 2021) (*quoting* 4 *Nimmer on Copyright* § 13.03(A)(1)). *See also Novelty Textile Mills v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 (2d Cir. 1977) (finding defendant's work was substantially similar to plaintiff's when the latter, "to our 'lay' eyes, is almost identical").

Hursey has demonstrated that, without his consent, Hakimian reproduced and publicly displayed an exact copy of the Work on its commercial website. (Dkt. 16, 17 & 21). There is no question that the two photos are identical, and thus both strikingly and substantially similar.

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

Hursey requests the maximum allowable statutory damages of $5,000 in this smaller-claims track proceeding. (Dkt. 15). 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 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); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (*quoting F.W. Woolworth*, 344 U.S. at 232).

Furthermore, various courts have explained that (regardless of willfulness or lack thereof) statutory damage awards should significantly exceed the amount of unpaid license fees because the award "should put infringers on notice that it costs less to obey the copyright laws than to violate them." *Broadcast Music, Inc. v. DFK Entertainment, LLC,* No. 1:10-CV-1393 GLS/DRH, 2012 WL 893470, at *4 (N.D.N.Y. Mar. 15, 2012) (internal quotation marks

and citation omitted). As the court noted in *Werner v. Evolve Media, LLC*, No. 2:18-CV-7188-VAP-SKx, 2020 WL 4012784, at *3 (C.D. Cal. June 22, 2020):

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

(*quoting F.W. Woolworth*, 344 U.S. at 233). *See also Philpot v. L.M. Commc'ns II of S.C., Inc.*, 343 F. Supp. 3d 694, 702–03 (E.D. Ky. 2018), *rev'd and remanded on other grounds 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) (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) ("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 v. L.M. Commc'ns II of S.C., Inc.,* 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 Publ'g v. Zanzibar on the Waterfront, LLC*, 698 F. Supp. 2d 197, 207-08 (D.D.C. 2010).

Hursey provided the Board with the evidence and information needed to establish the license fee for the specific image at issue here. (Dkt. 25). As described above, Hursey has testified before the Board that a potential licensee can access Hursey's stock image website, select a photograph, and choose from a drop-down menu what kind of usage they would like – on the web, social media and/or print, the territory of permitted usage, how large they would like the image, and the length of use. (Dkt. 24); Lavaca Hearing Tr. at 16:05-20:47. He also testified that in the past three years, he has licensed the use of stock photographs using the same pricing model. Lavaca Hearing Tr. at 13:00-15:03; 33:00-33:34. In this case, the Work was displayed on Hakimian's website for over a year (potentially more than two years) and measured 170 x 170 pixels. (Dkt. 15-17, 20, 24). Hursey submitted evidence that the license fee for Hakimian's use – a worldwide single website use for two years of an image up to 175 x 175 pixels in size (each side is rounded up to the next size level on Hursey's licensing website) – would be $928.48. (Dkt. 24).

Awarding damages approximately three times Hursey's lost license fee for the infringed work in this case is appropriate to deter Hakimian and others from using Hursey's images without paying the appropriate license fees. Hakimian used the Work on a commercial website to market its services. (Dkt. 15). Hursey is a professional photographer and his ability to continue to license his stock images depends, in part, on his enforcement of unlicensed usage of his stock photos; otherwise, others will believe they can utilize his photos for commercial purposes without paying any license fees. *See* Claim (Dkt. 1). The Board finds that such an award is in line with precedent throughout the country.

Based on the record before it, the Board awards $3,000, which is approximately three times the amount of the proven actual damages of Hursey.

VI. Conclusion

The Board's proposed default determination is to find that Hakimian has committed copyright infringement and award Hursey $3,000 in statutory damages.