



# COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0035  
March 8, 2024

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Comedy Spotlight Productions, Inc.

CLAIMANT

v.

Store on Sunset LLC, Mandalay Sports Media/  
Mandalay Entertainment Group, and MAKE  
GOOD Content

RESPONDENTS

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## FINAL DETERMINATION

This matter has been fully submitted by the parties. For the reasons that follow, the Copyright Claims Board (“Board”) finds in favor of Respondent Store on Sunset LLC (“Sunset” or “Respondent”) and dismisses the claim against Sunset with prejudice.

As respondents Mandalay Sports Media/Mandalay Entertainment Group (“Mandalay”) and MAKE GOOD Content (“Make Good”) were served but never appeared in this proceeding, the claim against those entities is dismissed without prejudice.

### I. Procedural History

This claim was filed on January 25, 2023, by Claimant Comedy Spotlight Productions, Inc. (“Spotlight” or “Claimant”) against respondents Sunset, Mandalay, Make Good, and Sunlight Productions/Greentrees Films. Claim (Dkt. 1). The Board found the Claim compliant and, on February 10, 2023, directed Claimant to serve the respondents. (Dkt. 11). Claimant did not file a valid proof of service against Sunlight Productions/Greentrees Films, and that respondent was dismissed without prejudice. (Dkt. 21). Claimant filed proofs of service showing that Make Good and Mandalay were served on April 28, 2023 and May 1, 2023, respectively. (Dkt. 12-13). Claimant also filed proof of a May 19, 2023 waiver of service signed on behalf of Sunset. (Dkt. 16). The Board did not receive an opt-out form from Sunset, Mandalay, or Make Good.

On June 30, 2023, the Board notified the parties that the Claim had entered the “active phase” because the served respondents did not opt out, and ordered Spotlight to pay the second filing fee and ordered the served respondents to register for the Board’s online docketing system (eCCB). (Dkt. 22). On July 18, 2023, the Board

issued a Scheduling Order (Dkt. 24) and a Second Notice for the served respondents to register for eCCB. (Dkt. 25). Sunset's counsel registered for eCCB on July 20, 2023 (Dkt. 26) and filed Sunset's Response on August 17, 2023. Response (Dkt. 28).

Mandalay and Make Good never appeared in this proceeding. They did not file any documents required or ordered by the Board and did not attend any conferences. However, as Sunset participated in this proceeding, the case moved forward.

The Board held a pre-discovery conference on August 21, 2023, and a status conference on October 12, 2023. On October 23, 2023, the Board issued an order closing discovery as of that date and ordering the filing of written testimony. (Dkt. 29). As part of written testimony: Claimant filed evidence and an evidence list (Dkt. 31), as well as a Party Statement (Dkt. 30); Respondent filed evidence and an evidence list (Dkt. 34, 36-45), as well as a Party Statement (Dkt. 33). Claimant did not file an optional reply, and so, the written testimony phase was closed on February 8, 2024. This case is now ready for final determination.

## **II. Factual History**

The facts relevant to this Final Determination are largely uncontested.

Spotlight states, and Sunset does not dispute, that Spotlight is the copyright owner of a video of a forty-six-minute-long comedy routine titled "One Night With Dice" (the "Work"), which was performed by the comedian Andrew Dice Clay on or about May 10, 1986. Claim; Claimant Party Statement, at 1. The Work was registered by the U.S. Copyright Office as a motion picture with an effective date of registration of March 16, 1989 (Reg. No. PA000409262). *Id.*; Exhibit A-ops (Dkt. 31). The certificate of registration identifies Claimant as the author (of a work made of hire) and the copyright claimant, and it states that the work was first published on March 2, 1989. Exhibit A-ops (Dkt. 31). On January 30, 2020, Claimant granted "all distribution and exploitation rights of every kind in and relating to the [Work]" throughout the universe to Nacelle Company, Inc. d/b/a Comedy Dynamics for a period of ten years, subject to semiannual payments of 50% of gross receipts after the deduction of distribution expenses. Claimant Party Statement, at 1-2; Exhibit B-ops (Dkt. 31). The parties generally agree that in 2020, Sunset produced a five-part documentary series, titled "The Comedy Store," which chronicled the history of that

iconic Los Angeles stand-up comedy club, including the careers of the comedians who performed there and the impact of The Comedy Store on comedy. Claim; Response; Dkt. 30-31, 33-34.

Within the series, many different clips of comedians' performances are used. Episode Three, titled "The Wild Bunch" (the "Episode"), discusses some of the wilder comedians who performed at The Comedy Store. Dkt. 36-41 (the recording is broken into portions because of file size). One of those comedians was Andrew Dice Clay. In the Episode, there is a long piece related to the rise and fall of Andrew Dice Clay (from the 2:50 mark in Dkt. 41 through its end at 9:39, and then continuing into Dkt. 40 until the 0:50 mark). Within that piece, Andrew Dice Clay is interviewed extensively, and various people are also interviewed about Andrew Dice Clay's career, including the famous late comedian Bob Saget, who was interviewed by the series' director. Dkt. 41 (starting at approximately the 6:35 mark of that exhibit). In the discussion, Mr. Saget states: "All I remember is, it was a fast drop off." *Id.* The director responds: "He makes all these gay jokes." *Id.* The Episode then cuts to eighteen seconds of an Andrew Dice Clay performance—which Sunset does not dispute comes from the Work—where Mr. Clay makes homophobic jokes. *Id.* The portion played appears to be a cut of two clips, the first being a single line performed over five seconds, and the second being a few lines performed over thirteen seconds.<sup>1</sup> *Id.*

Spotlight seeks statutory damages of \$15,000. Claimant Party Statement, at 5.

### **III. Defenses**

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). Sunset does not contest Claimant's ownership of the Work (which is documented in the certificate of registration, Exhibit A-ops (Dkt. 31)), nor does it contest that it copied constituent elements of the work (which is clearly evidenced by a comparison of the works at issue). However, Sunset claims that its use of the work qualifies for the fair use defense. Because the Board agrees that Sunset's use was a fair use, it is unnecessary to

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<sup>1</sup> There is a very slight discrepancy between the party statements and the actual video as to the length of the clips. The Board has checked the video, and the portion taken from the Work is eighteen seconds, with the two clips being five and thirteen seconds.

further address whether Claimant has established a prima facie case of infringement.

In asserting that the fair use defense does not apply, Spotlight focuses on the second clip (of thirteen seconds), arguing that once Sunset used the initial five-second clip, no more was needed, and, even if it was appropriate for Sunset to use the second clip (which Spotlight terms the “Joke”), it could have used just the final punchline, and not the entire thirteen seconds. Claimant Party Statement, at 4-5; Claim.

As the proponent of the affirmative defense of fair use, Sunset has the burden of proof on the issue. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443, 459 (9th Cir. 2020), *cert. den.*, 141 S. Ct. 2803 (2021).

Four non-exclusive factors are considered when analyzing a fair use defense: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107; *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1174 (9th Cir. 2012). Based on the evidence in the record, the weight of the factors overwhelmingly favors a finding of fair use.

First, while the use of the Work was for a commercial movie, the movie was a documentary, and the Work was clearly used in furtherance of, and directly related to, the commentary and criticism in the documentary. The clips are not used for their original entertainment purpose. Rather, they are used as a specific example of the type of homophobic material that supposedly caused the quick downfall of Andrew Dice Clay’s career. There is no doubt that this use falls into the category of “criticism” and “comment[ary]” explicitly set forth in 17 U.S.C. § 107. Many courts have found that copying of a work in the context of commentary or criticism, including the use of a work to enhance a documentary discussing the subject of the work, qualifies for the fair use defense—and, at the very least, it strongly tilts the first factor analysis towards a defendant. *See, e.g., SOFA Entertainment, Inc. v. Dodger Productions, Inc.*, 709 F.3d 1273, 1278-79 (9th Cir. 2013) (affirming fair use finding because use of an Ed Sullivan clip in the musical *Jersey Boys* was a “biographical anchor” to show the development of the band the Four Seasons, and “undoubtedly” fair use; also finding that such use made “the fact that *Jersey Boys* is a commercial production . . . of

little significance”); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608-09 (2d Cir. 2006) (use of seven artistic works depicted on event posters and tickets was considered fair use in a book “documenting the 30-year history of the Grateful Dead,” because the works were used to enhance the information in the book, which was “plainly different from the original purpose for which they were created”); *Monster Communications, Inc. v. Turner Broadcasting System, Inc.*, 935 F. Supp. 490, 493-94 (S.D.N.Y. 1996) (finding that a television biography of Muhammed Ali using between forty-one seconds and two minutes of plaintiff’s work “undeniably constitute[d] a combination of comment, criticism, scholarship and research, all of which enjoy favored status under § 107”) (citation omitted); *Red Label Music Publishing, Inc. v. Chila Productions*, 388 F. Supp. 3d 975, 984-85 (N.D. Ill. 2019) (use of *Super Bowl Shuffle* video and music was a “historical guidepost . . . that construct[s] new narratives about the history of the [Bears] and the NFL” in a documentary about the 1985 Chicago Bears, and was “not serving its original function of entertainment” in the allegedly infringing film; when the copyrighted work is used in such a way, it does not typically matter that the alleged infringement is commercial in nature); *Hofbeinz v. AMC Productions, Inc.*, 147 F. Supp. 2d 127, 137 (E.D.N.Y. 2001) (use of various copyrighted works in a documentary “to educate the public of the impact [the subjects of the work] had on the movie industry” was likely transformative). *See also Campbell*, 510 U.S. at 578-79 (the fair use inquiry may be guided by the specific examples stated at the beginning of Section 107, including criticism and commentary, with the “central purpose” of the first factor to see whether the new work “merely supersedes the objects of the original creation,” that is, “supplanting the original,” or instead transforms the original to add a new meaning or message; “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use”) (quotations and citations omitted).<sup>2</sup>

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<sup>2</sup> Although represented by counsel, Claimant cites only one case in arguing against fair use, *TCA TV Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016). Claimant Party Statement, at 4. That case, where a substantial portion of Abbott & Costello’s “Who’s on First?” routine was performed verbatim in a play and not used in any way for criticism or commentary of the routine or Abbott & Costello, is not analogous to this proceeding.

As to the second factor, the Work is creative in nature, and so it would normally weigh against the fair use defense. However, the weight of this factor is almost negligible when the use of the creative work is for a clear transformative purpose such as criticism or commentary. *See, e.g., Monster*, 935 F. Supp. at 494-95 (finding this factor neutral, in part because taking “too narrow a view of the fair use defense” where the work used is creative “could materially undermine the ability of . . . biographers to tell” an important story); *Bill Graham*, 448 F.3d at 612-13 (recognizing “that the second factor may be of limited usefulness when the creative work of art is being used for a transformative purpose” and finding limited weight where the “use was to emphasize the images’ historical rather than creative value”); *Red Label*, 388 F. Supp. 3d at 985 (finding this factor neutral where the use of the work was “not related to its mode of expression but rather to its historical facts”); *Campbell*, 510 U.S. at 586 (this factor “is not much help” in the fair use analysis when, for instance, a transformative use must take the original to achieve its purpose). As such, this factor is neutral in the analysis here, or at best, slightly weighs against fair use.

The “amount and substantiality” factor weighs heavily in favor of fair use. In terms of the clips’ relation to the Work as a whole, Sunset took thirteen seconds (if referring to the Joke) or eighteen seconds (if referring to both clips) out of a forty-six-minute Work. That is less than one percent of the Work. *See Monster*, 935 F. Supp. at 495 (finding that this factor “strongly favor[ed]” defendants where 0.7 to 2.1 percent of the Work was used); *Hofbeinz*, 147 F. Supp. 2d at 139 (clips of ten to fifty-four seconds of various copyrighted films used in a documentary were “*de minimus*” and pointed towards fair use). It is also clear that Sunset used no more of the Work than was necessary, and Sunset rightfully argues that Spotlight’s argument that Sunset could have used the very last line (the “punch line”) of the thirteen-second clip and not the set-up lines is nonsensical, especially in the context of a documentary about comedy. *See, e.g., Brown v. Netflix, Inc.*, 855 Fed. Appx. 61, 64 (2d Cir. 2021) (“The fair use doctrine does not obligate the Film to use the shortest possible snippet to convey its message of commentary and criticism. . . . [The amount used] was reasonably necessary to convey the Film’s message.”); *Red Label*, 388 F. Supp. 3d at 986 (factor favored fair use where insubstantial use amounting to 2 percent of the music and 17 percent of the video was made and “was no more than necessary to serve as a historical reference point”); *Campbell*, 510 U.S. at 589 (where “no more was taken than necessary” for a fair purpose, copying cannot be considered excessive);

*Hofbeinz*, 147 F. Supp. 2d at 139-40 (defendants took no more “than was necessary in light of the subject matter of their Documentary”).

Finally, there is no meaningful evidence that the use of the Joke (or entire clip) affected the market or value of the Work. There is no rational argument that use of less than one percent of the Work in this circumstance would have satisfied someone looking to see the Work, and thus acted “as a substitute for the original.” *See SOFA*, 709 F.3d at 1280 (“Where the secondary use is not a substitute for the original and does not deprive the copyright holder of a derivative use, the fourth factor weighs in favor of fair use.”) (citations omitted); *Brown*, 855 Fed. Appx. at 64 (“the intended audience for the Song would be unlikely to purchase the Film ‘in preference to the original’”) (citations omitted). Furthermore, Spotlight submits an accounting of license revenues and an individual license for the Work showing there may be some market for licensing, but no evidence that there is any market for the licensing of short clips from the Work. Exhibits F-ops & G-ops (Dkt. 31). *See Brown*, 855 Fed. Appx. at 64 (“Because fair use always results in some loss of royalty revenue, however, we consider only the ‘challenged use’s impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.”) (citation omitted); *Bill Graham*, 448 F.3d at 614-15 (same principle, and also stating that copyright owners “cannot preempt exploitation of transformative markets” regardless of whether there may be a loss of license fees) (citation omitted); *Campbell*, 510 U.S. at 592 (“the law recognizes no derivative market for critical works” even if demand for the original work is suppressed (as opposed to usurped)).

In sum, the weight of the fair use factors clearly favors fair use in this case. Accordingly, the Board dismisses the claim against Sunset with prejudice. As the use alleged against respondents Mandalay and Make Good is the exact same as the use of the Work made by Sunset, the fair use defense applies equally to them such that default will not be entered against them; instead, the case against those respondents will be dismissed without prejudice.<sup>3</sup>

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<sup>3</sup> “As a general rule then, when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted.” Default Judgments in Actions Involving Several Defendants, 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2690 (4th ed.) (citing the seminal case of *Frow v. De La Vega*, 82 U.S. 552, 554 (1872), which found that granting a default judgment against one defendant, before considering the defense of the appearing defendants, which if meritorious would apply to the defaulting defendant, would be “unseemly and absurd” as well as “incongruous and illegal”). And, “if an

#### IV. Conclusion

The Board dismisses the claim against Store on Sunset LLC with prejudice. As respondents Mandalay Sports Media/Mandalay Entertainment Group and MAKE GOOD Content were served but never appeared in this proceeding, the claim against Mandalay Sports Media/Mandalay Entertainment Group and MAKE GOOD Content is dismissed without prejudice.

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action against the answering defendants is decided in their favor, then the action should be dismissed against both answering and defaulting defendants.” *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001) (citing *From*).

Regarding the Board’s determination that the dismissal against Mandalay and Make Good is without prejudice, the Board’s regulations on default proceedings are instructive here: where the evidence against a defaulting respondent is insufficient to support a finding in favor of the claimant, the Board dismisses the claim without prejudice against the defaulting respondent, in part, so that respondent does not have an incentive to default and to allow for the possibility that discovery against that respondent could result in a different outcome. *See* 37 C.F.R. § 227.3(a)(2).