



COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0005

November 1, 2023

Julie Dermansky

CLAIMANT

v.

Rule 62, Inc.

RESPONDENTS

FINAL DETERMINATION

On September 28, 2023, the Copyright Claims Board (Board) issued the below Proposed Default Determination, proposing a finding that Respondent Rule 62, Inc. has committed copyright infringement and that Claimant Julie Dermansky should be awarded \$1,350 in statutory damages. The Proposed Default Determination and a Notice of Proposed Default Determination were sent via mail and email to the addresses on file for Rule 62, Inc. More than thirty days have passed, and Rule 62, Inc. 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 Rule 62, Inc. liable for copyright infringement and awards Julie Dermansky \$1,350 in statutory damages.

* * * * *

Respondent, Rule 62, Inc. (“Rule 62”), 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, Julie Dermansky (“Dermansky”), 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 Dermansky and awards \$1,350 in statutory damages.

Rule 62 now has thirty days, ending on October 30, 2023, 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 Rule 62 at all postal and email addresses reflected in the record. *Id.* If Rule 62 submits an opposition, the Board will evaluate any materials submitted by Rule 62 before issuing a final determination. *Id.* § 1506(u)(3). If Rule 62 does not submit a response, the Board will issue this default determination as a final determination. *Id.* § 1506(u)(4). **Any determination against Rule 62, including a monetary award for damages, will be enforceable in a court of law.**

I. Procedural History

This claim was filed on June 16, 2022. Claim (Dkt. 1). *See* 17 U.S.C. § 1506(z); 37 C.F.R. § 226.1. The Board found the claim compliant and, on July 12, 2022, directed Dermansky to serve Rule 62 within ninety days. (Dkt. 8). Dermansky filed a Proof of Service on September 19, 2022, which affirmed that Rule 62 was served on August 12, 2022 by personal service to its corporate authorized agent. (Dkt. 12). The Board sent a Second Notice to Rule 62 by mail on September 28, 2022. (Dkt. 14). On October 19, 2002, the Board extended the opt-out period until December 5, 2022 out of an abundance of caution due to a potentially confusing statement in the Second Notice. (Dkt. 13). The Board did not receive an opt-out form from Rule 62.

On December 6, 2022, the Board notified the parties that the proceeding had entered the “active phase” because Rule 62 did not submit a timely opt-out and ordered Dermansky to pay the second filing fee and Rule 62 to register for the Board’s online docketing system (eCCB). (Dkt. 15). On January 6, 2023, the Board issued a Scheduling Order (Dkt. 17) and a Second Notice for Rule 62 to register for eCCB. (Dkt. 18). The Board issued all of the foregoing orders through eCCB and also mailed them to Rule 62.

In the Scheduling Order, Rule 62 was ordered to submit a response by February 6, 2023, and both parties were ordered to attend an initial conference to be held on February 15, 2023. (Dkt. 17). Rule 62 did not file a response nor attend the conference, but prior to the conference, the Board noticed a significant discrepancy between the claim, which listed an Oakland, California address for Rule 62, and the proof of service, which stated that Rule 62 was served at a Delray Beach, Florida address. (Dkt. 1 & 12). At the February 15, 2023 conference, Claimant’s attorney confirmed that the address in the claim was erroneous, which meant the Board’s Second Notice—which relied on the address Dermansky entered in the claim—had been sent to the wrong address. Based on this

representation, the Board, in the interest of justice, again extended the opt-out period to March 20, 2023. (Dkt. 19).

The Board mailed the Second Notice to Rule 62 at the Delray Beach, Florida address on February 16, 2023.

Rule 62 still did not opt out and therefore, the proceeding became active again, and Rule 62 was again ordered to register for eCCB. (Dkt. 21 & 23). An Amended Scheduling Order was also issued. (Dkt. 22). The Board issued all of the foregoing orders through eCCB and also mailed them to Rule 62.

In the Amended Scheduling Order, Rule 62 was ordered to submit a response by May 24, 2023, but Rule 62 did not. Both parties were also ordered to attend a new initial conference to be held on June 1, 2023. (Dkt. 22). While Dermansky did attend the conference, Rule 62 did not.

On May 26, 2023, the Board issued its First Default Notice because Rule 62 did not meet any of the mandatory deadlines set by the Board. (Dkt. 26). The First Default Notice gave Rule 62 another thirty days to file a response and register for eCCB. *Id.* On June 13, 2023, the Board issued its Second Default Notice, which reminded Rule 62 of the June 26, 2023 deadline. (Dkt. 27). These notices were issued using the same contact procedure described above.

Rule 62 failed to file a response or register for eCCB by June 26, 2023. The Board has received no communication from Rule 62 at all. Accordingly, on July 3, 2023, the Board ordered Dermansky to submit written direct testimony in support of a default determination. (Dkt. 28). Dermansky submitted the required written materials on August 17, 2023, consisting of a party statement, a Witness Statement of Julie Dermansky (“Dermansky Statement”), an evidence list, and evidence. (Dkt. 29-44).

Pursuant to 37 C.F.R. § 227.2(b), on August 24, 2023, the Board issued an Order to Submit Additional Evidence (Dkt. 45). The Order noted that Dermansky submitted six settlement agreements and a general freelance contract with the entity for which the work at issue was taken along with the invoice for the photo shoot. *Id.* However, she did not submit any licenses for any pre-existing (stock) photographs, even though her witness statement alluded to the potential existence of such licenses. *Id.* As such, Dermansky was given until September 11, 2023, to submit any additional licenses or other evidence or witness statements she wished the Board to consider. *Id.* On September 11, 2023, Claimant submitted exhibits consisting of a Contributor Agreement with Getty Images (“Getty”), a Getty royalty statement, an email showing Dermansky’s termination of the Getty

Agreement, and a screenshot from Dermansky's website. (Dkt. 46-47 & 49-50). Dermansky also submitted a Supplemental Witness Statement of Julie Dermansky ("Dermansky Supplement") (Dkt. 51) and a Supplemental Party Statement. (Dkt. 48).

II. Factual History

Dermansky is a Louisiana-based professional photographer. (Dkt. 1); Dermansky Statement (Dkt. 39) ¶ 2. Dermansky owns the copyright (Reg. No. VA 2-150-409) in a photograph of an Exxon oil refinery (the "Work"). Dkt. 1; Dermansky Statement ¶ 11; Dkt. 44. The Work, titled "Revealexxon1," was registered to Dermansky as a part of a group registration of 118 published photographs. (Dkt. 44). The effective date of registration is May 7, 2019, and the registration states that the group of works was published from February to May 2019, with the Work being published in April 2019. *Id.*

Dermansky created the photograph pursuant to a general freelance contributor agreement she has with the Center for Investigative Reporting ("CIR"). Dermansky Statement ¶¶ 4-5; (Dkt. 34). Dermansky keeps copyright ownership in all of her photographs used by CIR under the agreement. Dermansky Statement ¶ 4. On April 18, 2019, CIR asked Dermansky to take a photograph of the Exxon oil refinery in Baton Rouge. *Id.* ¶ 5. For the assignment, Dermansky charged CIR \$450 plus \$96.86 in expenses. *Id.* ¶ 8; (Dkt. 30). CIR used the Work in an article published on April 24, 2019. Dermansky Statement ¶ 9 (Dkt. 31).

At some point, Dermansky discovered that Rule 62, a Florida limited liability company, copied the Work into an article on its website, www.healingproperties.org. *Id.* ¶ 12. Dermansky attached a screenshot of Rule 62's use with her claim and with her default papers, but has not provided the article or any context. (Dkt. 1 & 35). All that can be seen is: the photograph; a caption under the photograph that reads "The company calls it work-based recovery. Patients say it's more akin to slavery. We think it looks a whole lot like indentured servitude. How's such a thing even legal?"; and, a header under that in a larger font, stating "Work-Based Recovery?" *Id.* While healingproperties.org appears to be commercial, offering addiction recovery services, the little context given from the evidence does not suggest Rule 62 sold the Work in any way or used it directly to generate sales. *Id.*

On July 22, 2020, Dermansky's attorney sent a demand letter to Rule 62, demanding that the Work be removed from the healingproperties.org website and for compensation. Dermansky Statement ¶ 13. Dermansky states that rather than respond to her attorney's letters, Rule 62 emailed her directly admitting that it "had no authorization to use my photograph." *Id.* Dermansky's attorneys then sent follow-up letters but neither she nor her attorneys received any further communications from Rule 62. *Id.* ¶ 14. However, Dermansky does not attach any of the letters from her attorneys or the supposed admission email from Rule 62 to her papers in this proceeding.

Dermansky states in her initial witness statement that she took the assignment, aware that the photos she shot, including the Work, would have monetary value after the job was complete. *Id.* ¶ 5. She also states that the amount she charged CIR takes into account her relationship with CIR, her support of CIR's mission, and the limitations on CIR's use, and that she takes assignments knowing that she "will make more money licensing the work after the embargo set on the photos runs out." *Id.* ¶ 8. According to the CIR agreement, its exclusivity runs for thirty days from CIR's publication of a photograph. (Dkt. 34). Although CIR's exclusive license for the Work expired over four years ago, Dermansky did not submit any other licenses for the Work.

Dermansky's initial witness statement made numerous references to her licensing activities. *See, e.g.*, Dermansky Statement ¶ 3 ("As a professional photographer, my income relies on revenue from licensing my work."); ¶ 8 (without mentioning the amount, referring to her "typical rate for a license to use one of my photographs by a party unrelated to the assignment" and stating that she expected to engage in such licenses for the Work); ¶ 19 (implying that the licensing of works after an initial assignment license ends is her "primary source of income"). However, Dermansky did not submit any such licenses for her works, but instead submitted six settlement agreements from prior disputes. (Dkt. 29, 33, 36, 38, 41, & 42).

After being given the opportunity to submit more evidence, Dermansky submitted, among other things referred to above, a supplemental witness statement. (Dkt. 51). The supplemental witness statement in some ways contrasts with her original statement. In the supplemental witness statement, Dermansky states that she has never entered into "any licenses that are comparable to the use made by Respondent of my photograph." Dermansky Supplement ¶ 3. She states that she "would have never licensed the Photograph at issue for a commercial use," *id.* ¶ 7, but also says that she would have asked for more for Rule 62's commercial use than she normally asks for "editorial" uses.

Id. ¶ 5. However, other than the Getty Agreement (which she argues is irrelevant and the Board agrees), she does not supply any licenses for any of her works, whether commercial or editorial. Instead, she states that her license fees for “editorial uses of environmental photos range from about \$500 to about \$3,500.” *Id.* ¶ 6. She further states that she has never made the Work available for licensing to anyone “because I wanted to maintain its exclusivity,” *id.* ¶ 11, even though she noted multiple times in her initial statement that she created the Work with the express intent of licensing it after the 30-day exclusive period with CIR expired. Dermansky Statement ¶¶ 5, 8.

Dermansky also submitted her Getty Agreement (Dkt. 46) and a Getty Royalty Statement (Dkt. 47). The Getty Royalty Statement shows that Getty licensed numerous Dermansky images to commercial entities, usually for amounts ranging from between two dollars to twenty dollars. (Dkt. 47). Dermansky was then paid 30% of this amount, so that she was rarely paid more than two dollars for the licenses. *Id.* Based on the way Getty allocates income for many of its licenses (aggregating all the money it receives and allocating the same amount to every photograph for every photographer), *see* Dermansky Supplement ¶ 13, Dermansky argues that the Getty licenses have little relevance, if any, and the Board agrees. However, along with the aggregated licenses, the Getty Royalty Statement shows that Getty licensed an individual Dermansky image for a textbook for \$325. (Dkt. 47).

Dermansky is seeking the maximum \$15,000 statutory damages permitted. (Dkt. 1, 37).

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 VA 2-150-409 for the Work, which was effective as of May 7, 2019, and which states that the Work was published in April 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). Accordingly, the Board need only consider whether Rule 62 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. *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”).

Dermansky has demonstrated that, without her consent, Rule 62 reproduced and publicly displayed an exact copy of the Work on its commercial website. (Dkt. 31, 35 & 40). 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

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, 231–32 (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) 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) (“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).

In her original default papers, filed August 17, 2023, Dermansky provided the Board with her general freelance contributor agreement with CIR (Dkt. 34) and her \$450 plus expenses invoice for the photo shoot that resulted in the Work being created. (Dkt. 30). She also provided the Board with six settlement agreements (Dkt. 29, 33, 36, 38, 41, & 42), which she filed as “restricted,” due to her belief that they should be confidential. The Board addresses the settlement agreements first.

There is a presumption of public access for documents that the Board might use to make its determinations, so that, among other reasons, the public may properly evaluate the Board’s analysis. *See generally Lugosch v. Pyramid Company of Onondaga*, 435 F.3d 110 (2d Cir. 2006). However, the Board finds unsealing the settlement agreements unnecessary in this case given that they are not relevant to the Board’s analysis and will not be used by the Board in determining damages. *See, e.g., Yue v. Chordiant Software, Inc.*, C08-00019 JW, 2010 WL 11575579, at *3-4 (N.D. Cal. Apr. 22, 2010) (evidence of “settlements and licenses negotiated after the commencement of litigation are not relevant to what a willing buyer would have been reasonably required to pay a willing seller of plaintiff’s work”);

Attachmate Corp. v. Sentry Insurance, C08-1035RAJ, 2009 WL 10676462, at *3 (W.D. Wash. Jan. 15, 2009) (denying discovery motion given “no authority for the proposition that the price paid in a settlement of an infringement action or breach of license action is relevant to determining copyright infringement damages”); *Attachmate Corp. v. Health Net, Inc.*, C09-1161 MJP, 2010 WL 11561518, at *1 (W.D. Wash. June 18, 2010) (rejecting the assertion that third-party settlements “are relevant to determining the fair market value of licenses”).¹

Based on Dermansky’s submissions, the Board has little to go on to establish Dermansky’s actual lost license fees. While each of the following has weaknesses, the Board does have three pieces of information, which when looked at collectively, appear to have the most relevance: (1) the \$450 Dermansky was paid for the assignment that led to her creation of the Work and its license to CIR (Dkt. 30); (2) the \$325 Getty was paid for the license of a single Dermansky image in a textbook (Dkt. 47 at 4); and, (3) Dermansky’s statement that her typical license fee for her works ranges from \$500 to \$3,500. Dermansky Supplement ¶ 6.

As noted above, each of these have flaws. Dermansky’s purported license fee range is not supported by any evidence despite Dermansky being given extra time to submit licenses in support of her damages request. Therefore, the credibility of her statement is lessened even as the Board accepts the statement as evidence. The \$325 Getty was paid for the Dermansky image to be used in a textbook was submitted without context and Dermansky herself only received \$97.50 (30%) of that \$325. And, the \$450 Dermansky received for the photo shoot that resulted in the Work at issue was paid, in part, for Dermansky’s time and effort in taking a day’s worth of photographs. Various courts have stated that the fee paid for a commissioned photo shoot is an apples-to-oranges comparison with the lost license fee on a preexisting photograph and the two should not be conflated. *See, e.g., Baker*, 254 F. Supp. 2d at 353-54.

¹ In her Supplemental Party Statement (Dkt. 48, at 5 n. 1), Claimant cites patent cases for the proposition that settlement agreements are *sometimes* admissible as evidence when directly on point and involving the same patent. However, the general rule even in patent cases is that “settlements offered, negotiated or made under threat of litigation are generally not considered probative of a reasonable royalty because in the usual course they do not provide an accurate reflection of what a willing licensor would do in an arm’s length transaction.” *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F. Supp.2d 147, 159 (D.R.I. 2009). *See also Panduit Corp. v. Stablin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1164 n. 11 (6th Cir. 1978) (settlements should not be used because “[l]icense fees negotiated in the face of a threat of high litigation costs ‘may be strongly influenced by a desire to avoid full litigation.’”) (*quoting Rude v. Westcott*, 130 U.S. 152, 164 (1888)). Furthermore, even some of the cases cited by Claimant express skepticism about using settlements as evidence of royalties or value, or they involve damages that were hundreds to thousands of times the amounts at issue in this proceeding, such that litigation costs were likely relatively inconsequential and less of a factor in the determination of the overall settlement amounts in the cited cases than they would be here.

However, given that the \$325 Getty license, the \$450 CIR license (which, although for a commissioned photo shoot, was taken so that CIR could license one photograph, the Work, for its article), and the \$500 low end of the range stated by Dermansky as her typical license fee are so close to each other, and given that, for statutory damages, the Board has wide discretion to consider “what is just in the particular case,” including considering the nature of the copyright, and the need for deterrence, the Board is comfortable using \$450 as the base rate, representing a proxy for Dermansky’s lost license fee.

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 Publ’g v. Zanzibar on the Waterfront, LLC*, 698 F. Supp. 2d 197, 207-08 (D.D.C. 2010).

Awarding damages approximately three times Dermansky’s lost license fee for the infringed work in this case is appropriate to deter Rule 62 and others from using Dermansky’s images without paying the appropriate license fees.² Rule 62 used the Work on a commercial website. (Dkt. 15). Dermansky is a professional photographer who undertook great effort to take this particular photograph (Dermansky Statement ¶ 6), and her ability to continue to license her images depends, in part, on her enforcement of unlicensed usage of her preexisting photographs;

² As part of Dermansky’s request that the Board multiply her actual damages in calculating statutory damages (stating that “courts often award statutory damages in an amount equal to three to five times the amount of Claimant’s actual damages”), she notes the “scarcity” of her work due to the location from which she chose to photograph (“the top of the State Capital building”) and her experience, enabling her to get a detailed, sharp image. Dermansky Statement ¶ 6; Default Direct Party Statement, at 9-10. However, the Board has no need to decide whether it can use scarcity multipliers. Taking a photograph of one building from another building does not rise to a level that would make the Board consider the Work “scarce,” and the Board is already increasing what it has found to be Dermansky’s actual damages in determining its statutory damages award.

otherwise, others will believe they can utilize her photos for commercial purposes without paying any license fees.

The Board finds that such an award is in line with precedent throughout the country.³

Based on the record before it, the Board awards \$1,350, which is approximately three times the amount of the proven actual damages of Dermansky.

VI. Conclusion

The Board's proposed default determination is to find that Rule 62 has committed copyright infringement and award Dermansky \$1,350 in statutory damages.

³ Dermansky asks the Board to consider—and based upon this consideration, potentially increase the damages award—that, by filing before the Board, Dermansky was giving up a possible 17 U.S.C. § 1202 claim, which the Board cannot hear. Party Statement at 11-12 (Dkt. 37). The Board declines to do this. If viable, a Section 1202 claim is still available to Dermansky in federal court, so it is not actually foregone. Furthermore, as the Board cannot hear a Section 1202 claim, it cannot evaluate how much Dermansky has given up.