



# COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0163

August 31, 2023

Dana Hursey

CLAIMANT

v.

ROGER E QUINNEY

RESPONDENT

## FINAL DETERMINATION

On July 27, 2023, the Copyright Claims Board (Board) issued the below Proposed Default Determination, proposing a finding that Respondent Roger E. Quinney 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 and email to the addresses on file for Roger E. Quinney. More than thirty days have passed and Roger E. Quinney 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 Roger E. Quinney liable for copyright infringement and awards Dana Hursey \$3,000 in statutory damages.

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Respondent, Roger E Quinney (“Quinney”), has not appeared or participated in this proceeding before the Copyright Claims Board (Board), and the claim is now in default. If 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.

Quinney 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 Quinney at all postal and email addresses reflected in the record. *Id.* If Quinney

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

## **I. Procedural History**

This claim was filed on September 22, 2022, and Hursey selected a smaller-claims track proceeding, which has a damages cap of \$5,000. Claim (Dkt. 1). The Board found the claim compliant, and, on October 21, 2022, directed Hursey to serve Quinney within ninety days of the Notice. (Dkt. 4). Hursey filed a Proof of Service on October 30, 2022, which affirmed that Quinney was served on October 28, 2022, by personal service. (Dkt. 5). The Board sent a Second Notice to Quinney by mail and email on November 17, 2022. (Dkt. 7). The Board did not receive an opt-out from Quinney.

On January 3, 2023, the Board notified the parties that the claim had entered the “active phase” of the proceeding because Quinney was served and did not submit a timely opt-out, and ordered Hursey to pay the second filing fee and Quinney to register for eCCB. (Dkt. 8). On January 23, 2023, the Board issued a Scheduling Order (Dkt. 10) and a Second Notice to register for eCCB. (Dkt. 11). The Board issued all of the foregoing orders through its online docketing system (eCCB) and also mailed (and, in most cases, also emailed) them to Quinney.

In the Scheduling Order, Quinney was ordered to submit a response by February 22, 2023, but Quinney did not. Both parties were also ordered to attend an initial conference to be held on March 1, 2023. While Hursey did attend the initial conference, Quinney did not, despite the Board sending the Zoom link to the email on file for respondent on February 22, 2023.

On February 27, 2023, the Board issued its First Default Notice to Quinney because Quinney did not meet any of the mandatory deadlines set by the Board. (Dkt. 12). The First Default Notice gave Quinney thirty days to file a response and register for eCCB. *Id.* On March 15, 2023, the Board issued its Second Default Notice, which reminded Quinney of the March 29, 2023 deadline. (Dkt. 13). These notices were issued using the same contact procedures described above.

Quinney failed to file a response or register for eCCB by March 29, 2023. The Board received no communication from Quinney. Accordingly, on April 11, 2023, the Board ordered Hursey to submit written direct testimony in support of a default determination. (Dkt. 14). Hursey submitted the required written materials including a party statement, an evidence list, and evidence on May 8, 2023. (Dkt. 15-23).

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. 24). The Board recognized that information related to Hursey's licensing practices that he 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. 25).

## **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. 25). Hursey owns the copyright in a photograph of a couple in athletic clothing walking on a greenery-lined path. (Reg. No. VA 2-016-014)(the "Work"). Default Direct Party Statement (Dkt. 15); Evidence Doc A (Dkt. 17). The Work, entitled "DH\_371-4627," was one of 750 photographs registered by Hursey as a part of a group registration of published photographs. Evidence Doc A (Dkt. 17). 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 licensing stock photographs on stock.hursey.com 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. 23-CCB-0056 ("Lavaca Hearing Tr."). That testimony was taken in front of this Board, such that 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. 24); 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 menus 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.

On August 24, 2021, Hursey discovered that a copy of the Work was on display on Quinney’s commercial website (<https://www.drquinney.com/gallery>) to market therapy and consulting services. Evidence Doc C (Dkt. 22). The Work was located in a gallery of images in the “Gallery” subpage of Quinney’s main website. *Id.* Based on the date the scan for Hursey’s work was conducted, the photograph was posted to Quinney’s website no later than August 6, 2021. *Id.* The Board notes that Hursey’s Default Direct Party Statement states that the infringement was discovered on August 24, 2020, not 2021. Default Direct Party Statement (Dkt. 15). However, the party statement cites to the “Dr. Quinney Infringement Report” for that information, but the infringement report refers to a screenshot taken on August 24, 2021 and states that the “earliest established date of publication” is August 6, 2021.

Quinney, an individual residing and licensed as a clinical social worker in California, was identified by Hursey as the owner of the website in question at the time of the infringement. Default Direct Party Statement (Dkt. 15); Evidence Doc G (Dkt. 23). Hursey, through counsel, sent a cease and desist and demand letter to Quinney on February 9, 2022. Default Direct Party Statement (Dkt. 15); Evidence Doc D (Dkt. 19). After receiving no response regarding settlement, Hursey, through counsel, sent a second demand letter to Quinney on March 28, 2022. Default Direct Party Statement (Dkt. 15); Evidence Doc E (Dkt. 20). According to the March 28th letter, the infringing image was taken down sometime after the February 9, 2022, cease and desist letter was sent but before the March 28 letter was sent. Evidence Doc E (Dkt. 20). (“A review of the infringing website shows that my client’s image has been removed”). Hursey is seeking the maximum \$5,000 statutory damages permitted in a smaller claim proceeding. Default Direct Party Statement (Dkt. 15).

### III. Copyright Infringement

The Board must follow the law of the federal judicial circuit in which the action could have been brought when there is a conflicting precedent among the circuits. 17 U.S.C. § 1506(a)(2). The Board is aware of no circuit split of note relevant to this case, but because Quinney is located in California, which is in the Ninth Circuit, the Board cites primarily to Ninth Circuit cases.

To succeed on a claim for copyright infringement, a plaintiff 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). *See also Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 774 (9th Cir. 2018). Hursey submitted Certificate of Registration VA 2-016-014 for the Work, which was effective as of August 25, 2016. Evidence Doc A (Dkt. 17). 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 Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 988 (9th Cir. 2017)(citing *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998)). 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. In this case, the effective date of registration is outside of the five-year period; as such, the evidentiary weight given to the registration is in the Board’s discretion. 17 U.S.C. § 410(c).

Neither the copyrightability of the Work nor Hursey’s ownership of it is in question in this claim. The photograph is clearly creative and Hursey, a professional photographer, has provided evidence that he took the photograph. Default Direct Party Statement (Dkt. 15); Evidence Doc B (Dkt. 21). Furthermore, there is no question that the Work is copyrightable. *See Feist Publications*, 499 U.S. 340 at 346 (“originality requires independent creation plus a modicum of creativity”); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075 (9th Cir. 2000)(“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.”)(quoting *Rogers v. Koons*, 60 F.2d 301, 307 (2d Cir. 1992)).

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 Unicolors*, 53 F.3d at 984–85. However, copying can also be inferred if the allegedly infringed work and the allegedly infringing work are “strikingly similar,”

regardless of whether there is any evidence of access. *Id.* at 985 “Two works are strikingly similar when the similarities between them are so great that they are ‘highly unlikely to have been the product of independent creation.’” *Malibu Textiles, Inc. v. Label Lane Int’l, Inc.*, 922 F.3d 946, 953 (9<sup>th</sup> Cir. 2019)(quoting *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9<sup>th</sup> Cir. 2018)). *See also Unicolors*, 53 F.3d at 988 (it is permissible to infer copying when “the works are virtually identical”).

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)).

Hursey has demonstrated that, without consent, Quinney reproduced and publicly displayed an exact copy of the Work on a commercial website. Evidence Doc B & C (Dkt. 21 & 22). 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 the claim, 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 in this claim.

#### **V. Damages**

Hursey requests the maximum allowable statutory damages of \$5,000 in this smaller-claims track proceeding. Default Direct Party Statement (Dkt. 15). Courts have wide discretion to award statutory damages so long as they fall in the statutory range. *See F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 229-230 (1952); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). “[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 is controlling.”

*L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106-07 (1919). *See also Los Angeles News Service v. Reuters Television Int’l Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998).

In deciding the appropriate amount of statutory damages to award, courts generally establish a relationship between statutory damages and actual damages. *See 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”)(*quoting Michael Grecco Prods., Inc. v. Enthusiast Gaming, Inc.*, No. 19-cv-06399-LHK, 2020 WL 7227199, at \*10 (N.D. Cal. Dec. 8, 2020)).

When awarding statutory damages, courts have looked at various nonexclusive factors, including: “(1) the expenses saved and the profits reaped; (2) the revenues lost by the plaintiff; (3) the value of the copyright; (4) the deterrent effect on others besides the defendant; (5) whether the defendant’s conduct was innocent or willful; (6) whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced; and (7) the potential for discouraging the defendant.” *Mon Cheri Bridals, LLC v. Cloudflare, Inc.*, 2021 WL 1222492, at \*1 (N.D. Cal. Apr. 1, 2021)(*quoting Broadcast Music, Inc. v. Shabby Inc.*, 2006 WL 8442289, \*3 (N.D. Cal. Apr. 27, 2006)). Furthermore, in considering damages for a copyright infringement, courts are “guided by ‘what is just in the particular case, considering the nature of the copyright [and] the circumstances of the infringement.’” *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.).

“[D]efendants who violate the copyright laws must be put on notice that it costs less to obey the copyright laws than to violate them.” *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1040 (D. Mont. 1990)(awarding statutory damages for nonwillful infringement)(internal quotation marks deleted). Because of the deterrent purpose of statutory damages, courts, including in those in the Ninth Circuit, frequently observe that awards of statutory damages are generally based on some multiplier of the license fee that would have been paid by the defendant had it not infringed. 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.”

(citing *F.W. Woolworth*, 344 U.S. at 233).

A number of Ninth Circuit cases involving nonwillful infringement support a statutory damages award of approximately three times the license fee that the plaintiff would have received. See *Broadcast Music Inc. v. Paden*, No. 5:11–02199–EJD, 2011 WL 6217414, at \*5 (N.D. Cal. Dec. 14, 2011)(“Courts have consistently held that a statutory damages award three times the amount that the plaintiff would have received in licensing fees is appropriate under § 504(c)”); *Duffy Archive Ltd. v. Soul Lounge, LLC*, No. 21-CV-08322-MMC, 2023 U.S. Dist. LEXIS 3766, \*1-3 (N.D. Cal. Jan. 9, 2023)(finding statutory damages award “calculated by multiplying plaintiff’s license fee of \$3,000 ... by a factor of three ‘to provide a penalty against defendant and deter potential future infringement by similarly situated actors’” to be appropriate); *Broadcast Music, Inc. v. JMN Restaurant Mgmt. Corp.*, No. 14-CV-01190-JD, 2014 WL 5106421, at \*3 (N.D. Cal. Oct. 10, 2014)(awarding statutory damages of slightly more than three times the license fee to be reasonable and noting that “courts typically award three times the amount of a properly purchased license for each infringement.”).

Hursey provided the Board with the evidence and information needed to establish the license fee for the specific image at issue here. Additional Evidence (Dkt. 25). As described above, Hursey has previously 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 (Order to Submit Additional Evidence (Dkt. 24); Lavaca Hearing Tr. at 16:05 - 20:47), and that in the past three years, he has licensed the use of stock photographs using the same pricing model. *Id.* at 13:00-15:03; 33:00-33:34.

In this particular case, the Work was displayed on Quinney’s website for just over six months and measured 640 x 427 pixels. *Id.*; Evidence Doc C & E (Dkt. 22 & 20); Additional Evidence (Dkt. 25). Hursey submits that the license fee for Quinney’s use would be \$1,134.81; however, that figure was arrived at by assuming a license with a



duration of two years, based on an incorrect August 2020 start date. Additional Evidence as Requested from Dana Hursey (Dkt. 25). Using the license fee calculator from Hursey's website, the licensing fee for usage of the Work for more than six months and up to a year would have been \$988.66. To be clear, for purposes of determining the reasonable licensing fee for Quinney's use (which is only the starting point in determining the statutory damages award), the Board considers the difference between \$1,134.81 and \$988.66 to be relatively insignificant.

Applying a multiplier in this case is appropriate to deter Quinney and others from using Hursey's images without paying the appropriate license fees. Quinney used the Work on a commercial website to market Hursey's services. Default Direct Party Statement (Dkt. 15). The ability of Hursey, who is a professional photographer, to continue to license stock images depends, in part, on his enforcement of unlicensed usage of stock photos; otherwise, others will believe they can utilize Hursey's photos for commercial purposes without paying any license fees. *See* Claim (Dkt. 1). The Board finds that a multiplier of three times Hursey's lost licensing fee is in line with precedent, including in the Ninth Circuit.

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 Quinney has committed copyright infringement and award Hursey \$3,000 in statutory damages.