COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0183
February 16, 2024

Tom Schirmacher	*v.*	Allora Medical Spa
CLAIMANT		**RESPONDENT**

FINAL DETERMINATION

On December 21, 2023, the Copyright Claims Board (Board) issued the below Proposed Default Determination, proposing a finding that Respondent Allora Medical Spa has committed copyright infringement, and that Claimant Tom Schirmacher should be awarded $7,000 in statutory damages. A Corrected Notice of Proposed Default Determination was issued on January 9, 2024. The Proposed Default Determination and the Corrected Notice of Proposed Default Determination were sent via mail to the addresses on file for Allora Medical Spa. More than thirty days have passed, and Allora Medical Spa has not responded to the 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 Allora Medical Spa liable for copyright infringement and awards Tom Schirmacher $7,000 in statutory damages.

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Respondent, Allora Medical Spa ("Allora" or "Respondent"), 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, Tom Schirmacher ("Schirmacher" or "Claimant"), 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 Schirmacher and awards $7,000 in statutory damages.[1]

Allora now has thirty days, ending on February 8, 2024, from the issuance of this proposed default determination to submit any evidence or information in opposition to the proposed default determination. *Id.* A copy of this proposed default determination will be sent to Allora at all postal and email addresses reflected in the record. *Id.* If Allora submits an opposition, the Board will evaluate any materials submitted by Allora before issuing a final determination. *Id.* § 1506(u)(3). If Allora does not submit a response, the Board will issue this default determination as a final determination. *Id.* § 1506(u)(4). **Any determination against Allora, including a monetary award for damages, will be enforceable in a court of law.**

I. Procedural History

This claim was filed on September 30, 2022. Claim (Dkt. 1). On October 28, 2023, the Board issued an Order to Amend Noncompliant Claim. (Dkt. 2). Claimant filed an Amended Claim on November 14, 2022. (Dkt. 3). The Board found the Amended Claim compliant and, on November 22, 2022, directed Schirmacher to serve Allora within ninety days. (Dkt. 4). Schirmacher filed a (corrected) Proof of Service on March 13, 2023, which affirmed that Allora was served on January 13, 2023 by personal service on the "Manager" of the company. (Dkt. 8).

The Board sent a Second Notice to Allora by mail and email on March 15, 2023 (Dkt. 10), and extended the opt-out period to April 14, 2023, due to the corrected proof of service filed by Schirmacher. (Dkt 9). The Board did not receive an opt-out form from Allora.

On April 24, 2023, the Board notified the parties that the proceeding had entered the "active phase" because Allora did not submit a timely opt-out and ordered Schirmacher to pay the second filing fee and Allora to register for the Board's online docketing system (eCCB). (Dkt. 11). Claimant paid the second filing fee on May 5, 2023. On May 16, 2023, the Board issued a Scheduling Order (Dkt. 13) and a Second Notice directing Allora to register

[1] The Board previously issued this Proposed Default Determination on December 21, 2023; however, there was a discrepancy in the damage award amount between the Proposed Default Determination and the Notice of Proposed Default Determination. Accordingly, the Board reissues this Corrected Proposed Default Determination and the Notice of Proposed Default Determination to address this error.

for eCCB. (Dkt. 14). The Board issued all of the foregoing orders through eCCB and also mailed and emailed them to Allora.

In the Scheduling Order, Allora was ordered to submit a response by June 15, 2023, but Allora did not. Both parties were also ordered to attend a pre-discovery conference to be held on June 22, 2023 ("June 22 Conference"). While Schirmacher did attend the June 22 Conference, Allora did not. During the June 22 Conference, Claimant provided the Board with another email address for Respondent. (Dkt. 15).

On June 22, 2023, the Board issued its First Default Notice because Allora did not meet any of the mandatory deadlines set by the Board. (Dkt. 16). The First Default Notice gave Allora another thirty days to file a response and register for eCCB. *Id.* On July 6, 2023, the Board issued its Second Default Notice, which reminded Allora of the July 24, 2023 deadline to cure the missed obligations. (Dkt. 17). These notices were issued through eCCB and sent to Allora at both email addresses as well as by U.S. mail. (Dkt. 15).

Allora failed to file a response or register for eCCB by July 24, 2023. The Board received no communication from Allora at all. Accordingly, on July 28, 2023, the Board ordered Schirmacher to submit written direct testimony in support of a default determination. (Dkt. 18).

Schirmacher submitted the required written materials on September 15, 2023, consisting of a party statement, two witness statements, an evidence list, and evidence. (Dkt. 21-28).

II. Factual History

Tom Schirmacher is a professional photographer, director, and cinematographer who does work for various clients on a commission basis and also licenses pre-existing photographs to various publications and business entities for editorial and commercial uses, including various high-end brands. Declaration of Tom Schirmacher ("Schirmacher Decl.") ¶¶ 3, 6-7. (Dkt. 23). Schirmacher typically retains the copyright to all of his photographs and owns the copyright in a close-up photograph of a model's face and neck covered in large-crystal sea salt (the "Work"). *Id.* ¶¶ 4, 10; Evidence Doc. A (Dkt. 22). The Work, entitled "Salt Facial Photograph," was registered by Schirmacher as a part of a group registration of eight published photographs (Reg. No. VA 2-243-948).

Schirmacher Decl. ¶¶ 11-12; Evidence Doc. B (Dkt. 28). The effective date of registration is March 16, 2021, and the registration states that the group of works was published between February 9, 2013 and July 12, 2013. (Dkt. 28).

In 2022, Schirmacher discovered that an unauthorized copy of the Work was on display on Allora's posts on Instagram and Facebook that promoted a "giveaway" for customers. Schirmacher Decl. ¶¶ 13-14; Evidence Doc. C (Dkt. 25). The "giveaway" specifically instructed customers to share the Work in order to be eligible for a free product/service. *Id.* Allora published the Work on its social media accounts on December 20, 2021, after Schirmacher had registered the work. *Id.* ¶ 15. Schirmacher alleges that the infringement occurred from December 2021 - July 2022 but Schirmacher does not explain how he knows that the Work was taken down in July 2022. Schirmacher Decl. ¶ 25.

Schirmacher, through counsel, attempted to resolve this matter, but the parties were unable to reach a resolution. Declaration of Taryn R. Murray (Dkt. 24) ¶¶ 3-4.

Schirmacher has submitted three invoices showing that he licensed similar "beauty" photographs in 2020 and 2023. Schirmacher Decl. ¶¶ 17-23; Evidence Doc D (Dkt. 2). Invoice TRUNYC108685 shows that, on June 29, 2020, one of Schirmacher's photographs of a model was licensed for $1,900 for use on the licensee's website for two months. (Dkt. 26). The name of the licensee has been redacted, but Schirmacher testifies that the licensee was a dermatology company. Schirmacher Decl. ¶¶ 19-20; (Dkt. 26). That license was subsequently extended an additional nine months on November 25, 2020 for $2850. Invoice TRUNYC110037 (Dkt. 26). The third invoice, in the amount of $3,000, indicates that another of Claimant's model photographs was licensed on March 2, 2023, for use on the licensee's website and social media account for three months. Schirmacher Decl. ¶¶ 17-18; Invoice TRUNYC110037 (Dkt. 26). Under "User Usage," the invoice notes that the model permission and fee were approved and included in the license. (Dkt. 26). The name of the licensee has also been redacted but Claimant testifies that the licensee was a fashion magazine. Schirmacher Decl. ¶¶ 17; (Dkt 26).

Schirmacher is seeking $9,000 in statutory damages. Default Direct Party Statement at 6. (Dkt. 21).

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). Schirmacher submitted Certificate of Registration No. VA 2-243-948 for the Work, which was effective as of March 16, 2021, and which states that the Work was published between February 9, 2013 and July 12, 2013. (Dkt. 28). 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); *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). 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). However, neither the copyrightability of Schirmacher's Work nor the ownership of the Work is in question. The photograph is clearly creative and Schirmacher, a professional photographer, has provided evidence that they took the photograph (Schirmacher Decl. ¶¶ 9-12). Furthermore, there is no question that the Work is copyrightable. *See Feist Publications*, 499 U.S. at 346 ("[O]riginality requires independent creation plus a modicum of creativity."); *See also 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 (9th Cir. 2019) (*quoting Rentmeester v. Nike, Inc.,* 883 F.3d 1111, 1124 (9th 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)).

Schirmacher has demonstrated that, without his consent, Allora reproduced and publicly displayed a copy of the Work on its social media pages. Schirmacher Decl. ¶¶ 13-15; (Dkt. 22); (Dkt. 25). But for the cropping, 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

Schirmacher requests $9,000 in statutory damages. Default Direct Party Statement at 6. 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 assessed statutory damages should bear some relation to the actual damages suffered.").

Actual damages are primarily measured by "the extent to which the market value of the copyrighted work at the time of the infringement has been injured or destroyed by the infringement." *Fitzgerald*, 807 F.2d at 1118. 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,* 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).

Schirmacher has provided the Board with the evidence and information needed to establish a lost license fee in this proceeding by submitting three invoices showing that it licensed "beauty" photographs similar to the Work for online use. S*ee* Schirmacher Decl. ¶¶ 17-23; (Dkt. 26). Two of the invoices, both issued in 2020 (collectively, "2020 Licenses"), are for a license and the extension of that license to a dermatology company for use of a photo of a model:

- Invoice TRUNYC108685, dated June 29, 2020, for use on a commercial website for two months in the amount of $1,900. *Id.*
- Invoice TRUNYC110037, dated November 25, 2020, for continued use on that licensee's website for nine months the amount of $2850. *Id.*

The third invoice (Invoice TRUNYC110037) in the amount of $3,000 indicates that another of Claimant's model photographs was licensed to a fashion magazine on March 2, 2023 ("2023 License") for use on the licensee's website and social media account for three months. Schirmacher Decl. at ¶¶ 17-18; (Dkt. 26).

Those licenses for the use of a model photo on a commercial website by a dermatology company (as opposed to the 2023 license to a fashion company) are directly analogous to the use on Respondent's use on the social media pages of its spa business here. The average licensing fee of the 2020 License is $2375 over eleven months. The 2023 License is less relevant because it is not for a directly analogous use and, as noted on the invoice itself and unlike like the 2020 License, includes the model permission and fee. (Dkt. 26). The inclusion of those permissions would logically cost more than a license fee that does not include them. Claimant does not provide information about how much that permission and fee would have cost and so the Board has no way to deduct the fees for those services; however, the Board does not need to consider the 2023 License fee in its calculation of damages given the more relevant 2020 License.

Given that the Board has wide discretion to "consider what is just in the particular case," including the need for deterrence, the Board determines that the best approximation of Schirmacher's lost licensing fee is $2,300. Awarding damages approximately three times Schirmacher's lost license fee for the infringed work in this case is appropriate to deter Allora and others from using Schirmacher's images without paying the appropriate license fees. Allora clearly used the Work to market its services and encouraged others to share the Work as part of its promotion. Schirmacher is a professional photographer who licenses photographs and designs to various publications and business entities for editorial and commercial uses, and his ability to continue to license photographs depends, in part, on the enforcement of unlicensed usage of his photos; otherwise, others will believe they can utilize Schirmacher's photos for commercial purposes without paying any license fees. The Board finds that an award of approximately three times Schirmacher's lost license fee is in line with precedent throughout the country.

Based on the record before it, the Board awards $7,000, which is approximately three times the amount of the proven actual damages of Schirmacher.

VI. Conclusion

The Board's proposed default determination is to find that Allora has committed copyright infringement and award Schirmacher $7,000 in statutory damages.