



# COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0037  
April 15, 2025

Charles Osuchowski

CLAIMANT

v.

Tyler F. Lewis, Kathy E. Diaz,  
and Christopher Annis

RESPONDENTS

## FINAL DETERMINATION

For the reasons that follow, the Copyright Claims Board (“Board”) finds in favor of Charles Osuchowski (“Osuchowski” or “Claimant”) against Tyler F. Lewis (“Lewis”) on his claim of infringement of one of the five copyrights involved in this proceeding, and otherwise finds that Kathy E. Diaz (“Diaz”), Christopher Annis (“Annis”), and Lewis (collectively “Respondents”) are not liable for copyright infringement. The Board awards Claimant \$750 in statutory damages.

### I. Procedural History

Osuchowski brought this copyright infringement claim against Respondents, his former bandmates, on January 26, 2023, selecting a “smaller claims” proceeding. Dkt. 1. He filed the operative, amended claim on March 13, 2023. Dkt. 5 (“Claim”). Respondents filed separate responses to the Claim on October 30, 2023, raising various counterclaims. Dkt. 33-35, 37, 39. Respondents jointly filed an amended response and counterclaim on February 6, 2024. Dkt. 42 (“Claim Response”). The Board found the counterclaim noncompliant, Dkt. 43, and Respondents did not file an amended counterclaim, so the proceeding continued only on Osuchowski’s infringement claim. Dkt. 45. Discovery was complete on July 9, 2024. Dkt. 48. As directed, the parties filed their statements and evidence by September 11, 2024. Dkt. 49-74. Pursuant to 37 C.F.R. § 226.1, all parties appeared and testified at a merits conference held on September 25, 2024. Merits Conference (transcript on file with the Board) (“Tr.”).

The Board issued proposed findings of fact on March 14, 2025. Dkt. 75. No party objected to the proposed findings, which are adopted in the attached Findings of Fact. The claim is now ready for final determination.

## II. Summary of Factual History<sup>1</sup>

Osuchowski, a graphic designer and commercial artist, was a member of a musical group called Obsidian from 2018 until July 31, 2022. He alleges infringement of the following five works of visual art (the “Works”) that he created or co-created and that were used, or adapted for use, on Obsidian promotional and merchandise items while he was in the band:

1. “A Swamp,” the cover art of the four-song *A Swamp* EP released on or about November 29, 2018, on CD and online. Claimant Exhibit A (Dkt. 62) at 11, Claimant Exhibit I (Dkt. 67) at 3; Respondent Exhibit E(1) (Dkt. 73).
2. “Lips,” an illustration that Osuchowski conceived in 2013 and created in 2014, before Obsidian existed, that was posted on Obsidian social media pages beginning November 28, 2019. Claimant Exhibit A at 11.
3. “Living Dead,” an illustration that appeared on the cover of the six-song *Living Dead* EP released on CD, cassette, and online on November 27, 2019.
4. “Eros,” the cover art of the online-only single *Eros, Hypnos and Thanatos* released on January 30 or 31, 2020.
5. “Vultures,” an illustration drawn by Kris Garcia in 2015 or 2016 for use by Osuchowski’s earlier band Party Flag, which Osuchowski modified for use on the cover of Obsidian’s five-song EP *Vultures* released on October 30, 2020. Claimant Exhibit A at 11, Claimant Exhibit I at 4, Claimant Exhibit J (Dkt. 66) at 5, Claimant Exhibit L (Dkt. 55) at 1.

Respondents also were (and still are) members of Obsidian. Osuchowski acknowledges that while he was a member of Obsidian, Respondents had the right to copy, distribute, and publicly display the Works, but when he quit the band on July 31, 2022, he demanded that Respondents stop all use of the Works unless they purchased rights for their use. Litigation in state court ensued in Florida and the parties settled in January 2023. The settlement and release excluded “potential federal claims by either party under the United States Copyright Act or any federal statute.”

Meanwhile, in October 2022, Obsidian released the album *Collection 1* on CD and online, featuring “Lips” on the cover. Lewis uploaded *Collection 1* to make it available through online media outlets. The U.S. Copyright Office issued registrations of Osuchowski’s claims to copyright for all five Works with effective dates of registration of October 26, 2022. In November 2022, the *Collection 1* cover art online was changed to an image without “Lips.”

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<sup>1</sup> Except as noted herein, this section is based upon the more detailed Findings of Fact (“FOF”) appended to this Final Determination. For detailed findings of facts, the reader is referred to the FOF. Citations to the record in this section are to evidence of details not included in the FOF.

Claimant Exhibit L at 5. Around the same time, Lewis asked artist Noah Goldberg to redraw the *Living Dead* cover art and Lewis posted the redrawn artwork to Obsidian’s Bandcamp page, where it was on display for a few days. Tr. 1:54:14-1:54:44; Claimant Exhibit N (Dkt. 58).

Respondents had no physical copies of the *Living Dead*, *A Swamp*, and *Eros*, *Hypnatos*, and *Thanos* records in stock at the time Osuchowski left the band and did not make any additional physical copies of the Works since that time. Some copies of Works posted online while Osuchowski was in the band continued to appear on Obsidian’s website and other websites associated with the band after he left the band. After being notified of continuing uses, the band members took them down. There is no evidence that any Respondents are still using any of the Works.

### **III. Analysis**

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). As discussed below, the Board concludes that Osuchowski owns the copyright in “Lips” and that Lewis infringed that copyright; that there is no valid copyright in “Eros”; and that there is no evidence that any of the Respondents engaged in infringement of the copyrights in any of the other Works.

#### **a. Ownership**

Only “[t]he legal or beneficial owner of an exclusive right under a copyright” is entitled to sue for infringement. 17 U.S.C. § 501(b); *see also id.* § 1504(c)(1). Copyright ownership “vests initially in the author or authors of the work.” 17 U.S.C. § 201(a). A registration certificate issued no more than five years after first publication of the work creates a presumption that the copyright is valid and is *prima facie* evidence of the facts stated in the certificate, including the name of the copyright claimant and of the author. 17 U.S.C. §§ 410(c) & 1505(c). *See also Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020). Osuchowski submitted certificates of registration that name him as the sole copyright claimant (owner) of each Work.

“Living Dead” (Reg. No. VA 2-327-040) was registered less than five years after it was first published, so the presumption of validity applies to that work. However, that presumption is rebuttable, *Bateman v. Mnemonics, Inc.*, 79

F.3d 1532, 1541 n. 20 (11th Cir. 1996); *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997), and Respondents contend that “Living Dead” is actually a joint work co-created by Lewis and Osuchowski. There is no dispute that the artwork was conceptualized by Lewis and was based on his personal experience when he had lacerated his forearm with an obsidian rock specimen, and that Lewis gave Osuchowski a photograph of his outstretched left arm and hand, palm side up, and described the image he was looking for as: “Essentially arm like that with an obsidian chunk being forced down it with the other hand.” FOF ¶¶ 15-16. Lewis suggested the color scheme of red and black, and after receiving a sample from Osuchowski, he advised Osuchowski to “add more red to it.” FOF ¶ 17. While it was Osuchowski who actually drew the image, the process was an iterative and collaborative one in which drafts were shared and in which Osuchowski sought and received input. In short, Lewis gave Osuchowski a detailed description of the image that he wanted Osuchowski to draw, and Osuchowski added his own creative expression in executing Lewis’s vision, with a mutual intention that their contributions be merged into a unitary whole to be used for the benefit of Obsidian. The process of creation was interactive, with Lewis offering comments on several iterations drawn by Osuchowski, and Osuchowski implementing Lewis’s suggestions for revision while also employing his own creative skills as an artist. FOF ¶¶ 19-20.

The Copyright Act provides that a “joint work” is “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. Courts have interpreted that provision by focusing on the intended result rather than on whether the parties intended any particular legal consequences to flow from their collaboration. “[T]he intent prong does not have to do with the collaborators’ intent to recognize each other as co-authors for purposes of copyright law; the focus is on the parties’ intent to work together in the creation of a single product, not on the legal consequences of that collaboration.” *Jankey v. Lake County Convention & Visitors Bureau*, 576 F.3d 356, 362 (7th Cir. 2009). Osuchowski and Lewis collaborated in the preparation of “Living Dead” with such an intent, and the evidence rebuts the presumption from Osuchowski’s certificate of registration that he is the sole author and copyright owner of “Living Dead.” The Board finds that Lewis and Osuchowski are joint authors and co-owners of the copyright of “Living Dead.”

The legal consequences of joint authorship relieve Lewis of any liability for reproducing, distributing, or publicly

displaying “Living Dead.” A joint author of a work is a co-owner of the copyright in the work, 17 U.S.C. § 201(a), and “it is axiomatic that one copyright co-owner cannot sue another co-owner for copyright infringement.” 4 Paul Goldstein, *Goldstein on Copyright* § 4.2.2 (2025); *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011).<sup>2</sup>

“A Swamp” (Reg. No. VA 2-326-833) and “Eros” (Reg. No. VA 2-326-832) were registered less than five years after they were first published, so the presumption of validity also applies to those works. Respondents seek to rebut that presumption. They contend that “A Swamp” is a joint work created by Lewis, Annis, Joann Semander, and Osuchowski. However, the Board finds that it need not reach that issue because, as discussed further below, Osuchowski fails to show that any Respondent committed any act infringing the copyright in “A Swamp.”

Respondents assert that “Eros,” which features a work in the public domain (a 17th-century painting by Giulio Carpioni titled “The Kingdom of Hypnos”), is wholly unoriginal and unprotected by copyright. The Board agrees. “Eros” is the cover art for the Obsidian single *Eros, Hypnos, and Thanatos*. It consists of three elements: (1) the name of the band in a rounded, stylized font in all caps, centered at the top of the cover; (2) the public domain painting by Carpioni, which occupies two-thirds of the cover in the center, and (3) the title of the song “Eros, Hypnos and Thanatos” in a title-case typeface centered below the painting. FOF ¶¶ 24-26.

None of those three elements individually is eligible for copyright protection. “Obsidian” and “Eros, Hypnos and Thanatos” are words and short phrases that are not eligible for copyright protection. *See* 37 C.F.R. § 202.1(a); *Murray Hill Publications, Inc. v. ABC Communications, Inc.*, 264 F.3d 622, 632-33 (6th Cir. 2001); *DuBay v. King*, 844 Fed. Appx. 257, 265 (11th Cir. 2021). The font in which “Obsidian” appeared was the same font used by the band in all prior releases. FOF ¶ 26; Claim Response ¶ 7(c). Moreover, Osuchowski has clarified that the only copyright he is claiming in “Eros” is “the composition that includes those public domain elements” and that he makes no claim regarding the typeface, which is a public domain element. FOF ¶ 26; Tr. 39:28-39:54. Osuchowski’s assertion of copyright in the “composition” of the “Eros” cover is a claim in a compilation of individual uncopyrightable elements. While

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<sup>2</sup> There is no evidence that any particular Respondent other than Lewis copied, distributed, or publicly displayed “Living Dead” after Claimant left the band. However, even if there was evidence that one of the Respondents other than Lewis had done so, Lewis, as coauthor of the work, had the authority to permit them to do so. 4 *Goldstein on Copyright* § 4.2.2; *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007).

copyright may subsist in such a compilation, there must be sufficient originality in the selection, coordination, or arrangement of those elements. A combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003); *Latele Television, C.A. v. Telemundo Communications Grp., LLC*, No. 12-22539-CIV, 2015 WL 427817, at \*8 (S.D. Fla. Feb. 2, 2015). The mundane arrangement of the band’s name, the public domain painting, and the title of the album, centered and above each other in that order, falls far short of that test.

Accordingly, and notwithstanding the statutory (but rebuttable) presumption of validity under section 410(c), the Board concludes that “Eros” enjoys no protection under the Copyright Act and, therefore, Osuchowski owns no copyright in “Eros.”

The registration for “Lips” (Reg. No. VA 2-327-042) was issued more than five years after its first publication, so no presumption of validity arises from that certificate. Claimant Exhibit J at 1, 5; 17 U.S.C. § 410(c).<sup>3</sup> However, Osuchowski credibly testified that he conceived and began working on “Lips” in November 2013, about five years before Obsidian was formed, and that he created “Lips” independently without creative input from others. FOF ¶ 30; see Claimant Exhibit I at 1. Respondents contend that “Lips” is derivative of other logos depicting lips, and they submitted evidence of “stock images” of lips available on Pinterest, created at some point before September 2014, that bear some similarities to “Lips,” but that also have significant differences. Respondent Exhibits D(1)-D(3) (Dkt. 73); see Respondent Exhibit List (Dkt. 74). Osuchowski has shown that he had licensed an earlier version of “Lips” to a third party in 2013, FOF ¶ 30, and Respondents have not shown that any similar artwork existed before then. The Board has compared the final version of “Lips” with the “stock images” submitted by Respondents and concludes that “Lips” reflects at a minimum a more than trivial variation from the other depictions of lips before the Board. FOF ¶¶ 31-32. See *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102-03 (2d Cir. 1951) (“All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a

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<sup>3</sup> Because the Board finds that there is no evidence that Respondents engaged in any infringing acts with respect to “Vultures” and because the certificate of registration was issued more than five years after “Vultures” was first published, there is no need to address whether Claimant has a valid copyright in that work.

‘merely trivial’ variation, something recognizably ‘his own.’”) (internal citation omitted); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.08 (2025) (“Virtually any distinguishable variation created by an author in an otherwise unoriginal work of art may constitute sufficient originality to support a copyright.”). The Board finds that Osuchowski is the author and owner of a valid copyright in “Lips.”

#### **b. Unauthorized Use**

“When an owner’s conduct ‘clearly’ manifests ‘a consent to . . . use’ of copyrighted material, the owner impliedly grants a nonexclusive license.” *Midlevelu, Inc. v. ACI Information Group*, 989 F.3d 1205, 1216 (11th Cir. 2021) (quoting *De Forest Radio Tel. Co. v. United States*, 273 U.S. 236, 341 (1927)). It is undisputed that Respondents were authorized to use the Works at least until Osuchowski left the band on July 31, 2022, and that no use by Respondents of the Works before that date was infringing. See FOF ¶ 33.

When he left the band, Osuchowski clearly communicated to Respondents that they were no longer authorized to use the Works unless they purchased the rights to use them. FOF ¶ 9. Respondents did not purchase the rights. See FOF ¶¶ 10-13. Thereafter, for any Work other than “Eros” and “Living Dead,” any new reproduction, distribution, or public display of the Work, or making of derivative work based on the Work, by a Respondent would constitute copyright infringement.

*Reproduction and distribution.* Osuchowski has not produced evidence demonstrating that Respondents made physical copies of any merchandise bearing any of the Works after Osuchowski left the band. The *A Swamp*, *Living Dead*, and *Eros*, *Thanatos*, and *Hypnos* CDs were all out of stock by that time, and Respondents did not reprint them. FOF ¶ 34. The *Vultures* CDs and vinyl records were still in stock but as they had been lawfully made with Osuchowski’s authorization, Respondents were entitled to sell off any existing copies. Under the first sale doctrine, 17 U.S.C. § 109(a), an owner of lawfully made copies of a work is entitled to sell or otherwise dispose of those copies. In any event, while Osuchowski asserts that Respondents distributed copies to the public after he left the band, there is no evidence in the record of any such acts of distribution. There is some evidence that Obsidian offered the *Collection 1* CD for sale with “Lips” on the cover after July 2022, but the evidence is not conclusive. Claimant Exhibit L at 3; Claimant Exhibit O at 3. In any event, as the Board finds below that the online public display of *Collection 1* infringed

the “Lips” copyright, a finding that it was also infringed in other ways is immaterial.

*Public display.* Osuchowski presented evidence that a merchandise display at Obsidian concerts after July 2022 included images of “Vulture” and “Lips.” Claimant Exhibit L at 3; Claimant Exhibit O (Dkt. 61) at 3. The owner of a lawfully made copy of a work is also entitled to publicly display that work “to viewers present at the place where the copy is located,” 17 U.S.C. § 109(c), so those displays were not infringements. Online public displays, however, would not fall within the scope of section 109(c).

Before Osuchowski left the band, copies of the works were publicly displayed on the Obsidian website and other websites associated with the band, as well as on websites such as Bandcamp, Facebook, Instagram, Soundcloud, and Spotify where the band and its music were promoted. Some of those were posted by Osuchowski himself. FOF ¶¶ 35-36. With two exceptions, Osuchowski has not shown that after he left the band, any particular Respondent committed any act constituting a public display of any of the Works. FOF ¶ 38. Lewis’s posting of the redrawn Noah Goldberg version of “Living Dead” took place after Osuchowski left the band, but as joint owner of the copyright in “Living Dead,” Lewis had the right to publicly display it (and to authorize Goldberg to create that derivative work). However, the October 2022 release of *Collection 1*, which initially featured “Lips” on its cover, constituted a new and unauthorized public display of that Work. Based on the evidence, it is reasonable to conclude that Lewis was responsible for posting that image.<sup>4</sup> FOF ¶ 40.

Osuchowski has presented evidence that after he left the band, other images of his works remained online on the Obsidian website and other websites associated with the band. See Claimant Exhibits L and O. However, there is no evidence that any of those images was posted after July 31, 2022, nor is there evidence as to which (if any) of the Respondents was responsible for any of the other postings – whether made before or after Osuchowski left the band.

The Board concludes that Osuchowski has proved that the copyright in one of the Works was infringed by Lewis when he posted “Lips” online as the original cover art for *Collection 1*. Osuchowski has not proved that any of the other Respondents were involved in that infringing public display and he has not proved that the copyrights in any of

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<sup>4</sup> The posting of that image also would necessarily have involved the reproduction of the Work. And because what Lewis posted was the Goldberg variation of “Living Dead,” it involved the creation of a derivative work.



the other Works were infringed.

#### **IV. Damages**

Osuchowski seeks the minimum statutory damages award of \$750 per Work, for a total of \$3,750. Claimant Position Statement (Dkt. 50) at 3; *see* 17 U.S.C. §§ 504(c) & 1504(e)(1)(A)(ii). Because the Board has found that only the copyright in “Lips” was infringed, the Board awards \$750 as damages for infringement. Because the Board has concluded that Lewis alone was responsible for that act of infringement, he is the sole Respondent liable for those damages.

#### **V. Conclusion**

The Board finds in favor of Respondents on the claims of copyright infringement relating to “A Swamp,” “Living Dead,” “Eros,” and “Vultures,” and dismisses those claims with prejudice. On the claim of infringement of the “Lips” copyright, the Board finds in favor of Diaz and Annis and dismisses that claim with prejudice insofar as it is asserted against them, but finds against Lewis and awards Osuchowski \$750 in statutory damages.

Copyright Claims Board



# COPYRIGHT CLAIMS BOARD

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RESPONDENTS

## FINDINGS OF FACT

Claimant Charles Osuchowski (“Osuchowski” or “Claimant”) submitted a Claimant Position Statement (Dkt. 50), witness statements by himself (“Osuchowski Statement”; Dkt. 51) and by Kris Garcia (Dkt. 54), evidence (Dkt. 52-53, 55-59, & 61-70), and an evidence list (Dkt. 60) on September 10, 2024. Respondents Tyler F. Lewis (“Lewis”), Kathy E. Diaz (“Diaz”), and Christopher Annis (“Annis”) (together “Respondents”) submitted a Respondents Position Statement (Dkt. 71), a witness statement by Joann Semander (“Semander Statement”; Dkt. 72), evidence (Dkt. 73), and an evidence list (Dkt. 74) on September 11, 2024. All parties appeared and testified at a Merits Conference on September 25, 2024. Based on the submissions and the witness testimony at the conference, the Copyright Claims Board (“Board”) finds the following facts established.

### Background

1. Respondents are members, and Claimant is a former member, of a musical group called Obsidian. Osuchowski Statement ¶ 1.
2. In March 2023, Obsidian’s Facebook page described the group as a “Gothic rock band from Wilton Manors, Florida” with “3 EP releases: ‘A Swamp,’ ‘Living Dead,’ and ‘Vultures.’” Claimant Exhibit O (Dkt. 61) at 1.
3. Claimant is a graphic designer and commercial artist. He became a member of Obsidian in 2018 and left the group on July 31, 2022. Osuchowski Statement ¶¶ 1-2; Claimant Exhibit A (Dkt. 62) at 5; Respondents Position Statement (Dkt. 71) at 1; Merits Conference Transcript (“Conference Tr.”) at 7:05-7:41, 28:00-28:13 (on file with the Board).
4. Claimant created or co-created five works of visual art (the “Works”) that appeared on Obsidian merchandise items while he was a member of the group. On October 26, 2022, Claimant submitted applications to register copyrights in the five works (the “Works”) that are at issue in this case, and the Copyright Office issued certificates of registration for the Works, effective October 26, 2022, in November 2022. The registered Works are: “Eros” (Reg. No. VA 2-326-832), “A Swamp” (Reg. No. VA 2-326-833), “Living Dead” (Reg. No. VA 2-327-040), “Lips” (Reg. No. VA 2-327-042), and “Vultures” (Reg. No. VA 2-328-012). Claimant Exhibit J (Dkt. 66); Osuchowski Statement ¶¶ 1, 3; Claimant Position Statement (Dkt. 50) ¶¶ 1, 3.

5. Claimant acknowledges that when he was a member of Obsidian, Respondents had “the right to make copies of the Works, distribute them, and make public displays of them.” Conference Tr. at 8:37-9:04; *id.* at 9:52-10:06 (“until I left the band, they had the right to use the imagery”). Therefore, during the period of time when Claimant was a member of Obsidian, the other members of Obsidian had at the minimum an oral or implied license to make copies of the Works, distribute them, and make public displays of them.
6. Claimant asserts that he told Respondents several times that their use of the Works was “contingent on his ongoing participation in the group.” Claimant Position Statement ¶ 1; Osuchowski Statement ¶ 1; Claimant Exhibit B (Dkt. 63) at 5. Respondents dispute that point. Claimant Exhibit A at 5; *see* Semander Statement ¶ 7. The Board finds that the evidence on this issue is in equipoise and therefore cannot find that the license was subject to such a condition.
7. No written agreement relating to the creation or use of the Works existed among the band members while Claimant was a member of the band. *See* Response (Dkt. 42) ¶ 22; Claimant Exhibit A at 14.
8. On July 31, 2022, Claimant communicated to Lewis and Annis that he was leaving the band, sending them a text message that stated, “I quit,” Respondents Exhibits G(2) & G(3) (Dkt. 73).
9. Upon leaving the band, Claimant told Respondents that they were no longer authorized to use the Works unless they purchased the rights to the Works from him. Osuchowski Statement ¶ 2; Claimant’s Position Statement at 1; Claimant Exhibit B at 5.
10. Claimant’s July 31, 2022 text message also noted that “below is an invoice for all out of pocket expenses I have incurred.” The accompanying invoice sought \$1401.65 “total due” for a number of items, including entries for a “Buy out of rights” for each of the five Works (or at least for “Vultures” and “Lips”),<sup>1</sup> stating with respect to each Work with such an entry that “if not paid, all occurrences [sic] of artwork must be removed from social media, website, merchandise and all other promotional or product uses.” Claimant Exhibit D (Dkt. 68); Respondents Exhibit G(3) (Dkt. 73).
11. In text message exchanges sent after July 31, 2022, Respondents agreed to pay Claimant the amount of \$1401.65 “as requested on the invoice presented” and proposed to pay by check at the same time that they picked up their personal property that was in Claimant’s possession. They also stated that “We are not purchasing anything physical off of you. We are paying a debt and paying for rights to digital images.” However, disagreements concerning the manner of payment and when Claimant would release Respondents’

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<sup>1</sup> Claimant states that a copy of the invoice he sent on July 31, 2022 is in Claimant Exhibit D, which shows entries for a “[b]uy out of rights” for each of the five Works. Claimant Evidence List (Dkt. 60). Respondents dispute that, and assert that the invoice in Claimant Exhibit D is an altered document created by Claimant at a later time. Respondent Evidence List (Dkt. 74); Conference Tr. at 01:24:21-01:25:47. They state that the invoice Claimant actually sent on July 31, 2022 is the one in Respondents Exhibit G(3), which includes entries for buy-outs of the rights for only two of the Works: “Vultures” and “Lips.” *See* Conference Tr. at 01:25:52-01:26:39. The Board need not resolve the dispute to reach its final determination.

- property prevented the consummation of the agreement. See Claimant Exhibit D (Dkt. 69) at 2-4; Osuchowski Statement ¶¶ 2-3; Respondent Exhibit J (Dkt. 73); Respondents Position Statement at 1.
12. On August 19, 2022, an attorney representing Claimant and Iron Forge Press, Inc. (apparently Claimant’s graphic design business) sent letters to Respondents demanding that they and Obsidian Music LLC “immediately cease and desist from infringing the intellectual property owned by Charles Osuchowski, also known as Chuck Loose, and Iron Forge Press, Inc.” The letters demanded the return of Claimant’s intellectual property, including all copies in Respondents’ possession, and for Respondents to immediately cease and desist all use of the five Works. In the alternative, it stated that Claimant was “willing to sell rights to use some or all the subject artwork[.]” Claimant Exhibit E (Dkt. 56); Claimant Position Statement at 2.
13. Claimant had custody of several items belonging to Respondents when he left the group, including band merchandise and Annis’s guitar amp. Osuchowski Statement ¶ 3. Respondents, through Obsidian Music LLC, filed a lawsuit against Claimant in Broward County, Florida on August 23, 2022, seeking the return (“replevin”) of physical property in Claimant’s possession. Claimant filed a countersuit. Claimant and Annis (as manager of Obsidian Music LLC) signed a settlement agreement dated January 3, 2023. In the agreement, Claimant agreed to return specified merchandise and equipment to Obsidian Music LLC, which agreed to pay him \$500, and each party agreed to release any and all state-law claims against the other party. However, the settlement excluded “potential federal claims by either party under the United States Copyright Act or any federal statute.” *Id.* ¶¶ 3-4; Claimant Position Statement at 2; Claimant Exhibit K (Dkt. 53).

### **Findings Regarding the Allegedly Infringed Works**

#### ***A Swamp***

14. Because the Board concludes below that Respondents did not engage in infringement of the copyright in “A Swamp,” the Board makes no findings regarding the authorship or copyright ownership of that work.

#### ***Living Dead***

15. “Living Dead” is an illustration drawn by Claimant for use as cover art for a six-song Obsidian EP by the same title that was published on November 27, 2019, and was available online and on CD and cassette. Claimant Exhibit A at 11; Claimant Exhibit I (Dkt. 67) at 2; Claimant Exhibit J at 6; Conference Tr. at 23:39-24:08. Lewis had suggested the original concept for the artwork, which was based on his personal experience. Conference Tr. at 24:13-24:23, 27:15-27:47; Semander Statement ¶ 4.
16. In the process of the creation of the artwork, Lewis sent Claimant a picture of Lewis’s outstretched left arm and hand, palm side up, and told Claimant that the artwork should show “[e]ssentially [an] arm like that with an Obsidian chunk being forced down it with the other hand.” Respondents Exhibit I (Dkt. 73 at 22); Conference Tr. at 1:18:27-1:18:31, 1:21:02-1:21:06; Claimant Exhibit A at 6.

17. Lewis also suggested the color scheme of red and black. When Claimant sent Lewis black-and-white sketches for the cover art, Lewis “was very avid on it being red and black” and suggested that they “add more red to it.” Conference Tr. at 1:18:47-1:18:55; 1:21:16-1:21:42; Claimant Exhibit A at 7.
18. The description that Lewis conveyed to Claimant is consistent with the appearance of the work that Claimant drew, in which the left hand and arm are in a similar position to that in the photograph Lewis had sent to Claimant. *See* Claimant Exhibit J at 6.
19. During the creation of “Living Dead,” Claimant would share drafts of the work with Lewis and the other members of the band to receive their input. Conference Tr. at 24:39-25:18; 1:21:26-1:22:30.
20. The evidence shows that Claimant and Lewis collaborated in the creation of “Living Dead.” Lewis gave Osuchowski a detailed description of the image that he wanted Osuchowski to draw, and Osuchowski added his own creative expression in executing Lewis’s vision, with a mutual intention that their contributions be merged into a unitary whole to be used for the benefit of Obsidian. The process of creation was interactive, with Lewis offering comments on several iterations drawn by Osuchowski, and Osuchowski implementing Lewis’s suggestions for revision while also employing his own creative skills as an artist.
21. Osuchowski and Lewis are coauthors of “Living Dead.”

### *Eros*

22. Although the Board concludes below that Respondents did not engage in any acts that would constitute an infringement of any copyright in “Eros,” it makes the following findings of fact regarding copyrightability.
23. Claimant created “Eros,” the cover art for the album *Eros, Hypnos, and Thanatos*, which was published online on January 30 or 31, 2020. Claimant Exhibit O at 2; Claimant Exhibit A at 11.
24. The most prominent visual element of “Eros” is a 17th-century painting by Giulio Carpioni titled “The Kingdom of Hypnos,” which is included in “Eros” without alteration. Respondent Exhibit H (Dkt. 73); Conference Tr. at 39:01-39:11, 1:29:46-1:29:58. Claimant excluded the public domain work from the material claimed in his application to register the copyright. Claimant Position Statement at 5; Conference Tr. at 33:48-34:03.
25. While Claimant excluded the painting from his claim, he claimed authorship and ownership of certain “2-D artwork” within “Eros,” specifically the composition: placing the band name at the top and the title below the painting. Claimant Exhibit J at 4, 6; Conference Tr. at 35:49-36:12; *see id.* at 34:05-34:20 (Osuchowski authored “the assembly and design of the layout; the creation of the composition setting it in a final form”).
26. The only visual elements of “Eros,” other than “The Kingdom of Hypnos,” are the band name in a rounded, stylized font in all caps above the painting, the album title in a title-case typeface below the painting, and a black background. Claimant Exhibit J at 6. The Board finds that those are not creative elements that are protected by copyright. Claimant is not the author of the band name Obsidian or the stylized font band-name

logo. *See* Respondents Position Statement at 1; Response at ¶ 7(c) (describing Obsidian band-name logo designed by Natasha Dykes using a “free font” called Timepiece by FontMesa). He does not and cannot claim any copyright in the typeface, which he acknowledges is also a public domain element. Conference Tr. at 39:28-39:54. Claimant came up with the album title *Eros, Hypnos and Thanatos*, but he also does not claim copyright in the title; “it’s from Greek mythology; I couldn’t possibly claim authorship of it.” *Id.* at 34:43-35:00. He claims copyright only in the composition. *Id.* at 39:40-39:46.

27. The band name and album title are words and short phrases that are not protected by copyright. *See* 37 C.F.R. § 202.1(a). The display of the band name in a stylized font, and of the album title in a title-caps lettering typeface, is also not protected by copyright. *See id.*
28. A composition that consists of only unprotectable elements may nevertheless be protected by copyright, if the composition is creative enough; however, the Board finds that the simple arrangement of unprotectable elements in “Eros”—consisting of (1) the name of the band centered at the top, (2) the public domain painting beneath the band’s name, and (3) the name of the album centered beneath the painting—is not sufficient for copyright protection and cannot support an infringement claim.

### ***Vultures***

29. Because the Board concludes below that Respondents did not engage in infringement of the copyright in “Vultures,” the Board makes no findings regarding the authorship or copyright ownership of that work.

### ***Lips***

30. Claimant conceived and began working on “Lips” in November 2013, about five years before Obsidian was formed. Claimant Exhibit B at 6; Claimant Exhibit I at 1. He created the work independently, without creative input from others, by taking photographs of people’s lips and using them as references for his sketches. Conference Tr. at 20:19-21:55, 23:10-23:23. He licensed a non-party to use an earlier version of the work that he posted on Facebook in 2013. *Id.* at 22:00-22:29, 55:07-55:56; Claimant Exhibit B at 13; Claimant Exhibit R (Dkt. 70). The registration certificate, which issued with an effective date of registration of October 26, 2022, lists the year of completion as 2014 and the date of first publication as September 30, 2014. Claimant Exhibit J at 1.
31. “Lips” is a black-and-white illustration of a mouth. The white lips are flecked with irregular black spots; the bottom edges of both lips are rough and uneven. Below the upper lip, two large, white front teeth centered are between a pair of white fangs. A white tongue, outlined in black with black dot patterns simulating texture, sticks out toward the right over the lower lip. The space behind the teeth is black. *Id.* at 6.
32. While images such as “Lips” are commonplace, Claimant’s composition at a minimum reflects a distinguishable variation from prior works.

## Findings Regarding Infringing Uses

33. Respondents' uses of the Works during Claimant's years in Obsidian were with his consent. Claimant Exhibit A at 14; Conference Tr. at 8:46-9:04, 9:52-10:06.
34. *Physical Media.* Respondents had no physical media of any allegedly infringing copies of "A Swamp," "Living Dead," and "Eros" at the time Claimant left the band because they were "out of print production." Respondents Position Statement at 2; Conference Tr. at 57:07-57:23. Respondents did not create any physical media displaying any of the Works, such as CDs, cassettes, or other merchandise, after Claimant left Obsidian. Respondents Position Statement at 2; *see* Claimant Exhibit A at 11; Conference Tr. at 56:46-57:07, 1:47:43-1:48:00, 2:00:47-2:00:51. There is no evidence that Respondents sold or distributed physical copies of any Obsidian merchandise bearing any of the Works after Claimant left the band. However, even if any copies were sold or distributed during that time, the copies were made before Claimant left the band.
35. *Public Displays.* During the time when Claimant was a member of the band, copies of the Works were publicly displayed on the Obsidian website and other websites associated with the band, as well as on websites such as Bandcamp, Facebook, Instagram, Soundcloud, and Spotify where the band and its music were promoted. The Works were also publicly displayed in a merchandise display at live events. Claimant Exhibit L (Dkt. 55); Claimant Exhibit O; Claimant Exhibit A at 11; Respondents Exhibits C(3) & E(4) (Dkt. 73); Conference Tr. at 37:10-37:20.
36. Some of the works that were publicly displayed online, including some that remained online after he left the band, were posted by Claimant while he was still a member of the band. Conference Tr. at 58:40-59:06, 1:41:55-1:42:16. Some previously posted online displays of the Works remained online after Claimant left the band. Conference Tr. at 38:32-38:57; Claimant Exhibit L; Claimant Exhibit M (Dkt. 65). While the Florida lawsuit was pending, the band took works offline as they learned or were informed of allegedly infringing uses. Conference Tr. at 1:04:58-1:05:14, 1:05:50-1:06:20; 1:42:16-1:42:23. Whenever Respondents were notified (apart from Claimant's original notification that the Respondents should stop using the Works) that any of the Works was still up, they removed it. *Id.* at 57:46-58:31.
37. However, some previously posted online displays remained online even after the January 2023 settlement. Conference Tr. 57:24-57:45; 2:01:32-2:02:00; Claimant Exhibit O.
38. The Board finds that with one exception, there is no evidence that at any point after July 2022, when Claimant left the band and demanded that Respondents cease using the Works, any of the Respondents posted any image of any of the Works (apart from "Living Dead," which Lewis coauthored with Claimant) online. The one exception related to "Lips."
39. Respondents released an album titled *Collection 1* on or about October 25, 2022. In November 2022, Obsidian's Bandcamp page displayed an image of what appears to be album or CD cover art that included the

“Lips” image. The Bandcamp page also displayed the following statements: “Collection 1 is our songs recorded from 2018 to 2020” and “Original logo art by Hayden Woof.” Claimant Exhibit M (Dkt 65).

40. It is not clear which of the Respondents was responsible for posting the “Lips” image on the Bandcamp page, but the only witness who testified to personal knowledge regarding the circumstances surrounding the post was Lewis. See Conference Tr. at 01:51:59-01:53:58. The Board finds it reasonable to conclude that Lewis posted the image.
41. Claimant alleges that Respondents are responsible for other appearances of “Lips” and other Works on websites or social media controlled by or associated with Respondents, but there is no evidence that proves that any other allegedly infringing posts were made by any of the Respondents after Claimant left the band.

Copyright Claims Board