COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0003
July 25, 2024

Sabrina Giardina	*v.*	Petco Animal Supplies Stores, Inc.
CLAIMANT		**RESPONDENT**

FINAL DETERMINATION

This matter has been fully submitted by the parties. For the reasons that follow, the Copyright Claims Board ("Board") finds in favor of Claimant Sabrina Giardina ("Giardina") on her infringement claim and awards her $825 in actual damages.

I. Procedural History

Giardina filed her Claim against Respondent Petco Animal Supplies Stores, Inc. ("Petco") on January 4, 2023. (Dkt. 1). Petco filed its Response to the Claim on May 31, 2023. (Dkt. 12). Discovery closed on September 19, 2023, and the parties were directed to file written testimony. (Dkt. 21). On November 13, 2023, Giardina filed her Party Statement (Dkt. 22 at 1-4), her witness statement ("Giardina Statement"), *id.* at 5-6, a Statement of Damages Selection, *id.* at 8, an Evidence List, *id.* at 9, and evidence, *id.* at 10-35. On December 19, 2023, Petco filed its Respondent Party Statement (Dkt. 24 at 1-3), Declaration by Katie Hudgins ("Hudgins Decl."), *id.* at 14, and evidence, *id.* at 4-12, 15-25. After an order from the Board, (Dkt. 25), Petco submitted an Evidence List on December 22, 2023. (Dkt. 26). On January 11, 2024, Giardina filed a Reply Party Statement (Dkt. 28 at 1-8), a second witness statement ("Giardina Reply Statement"), *id.* at. 10-11, an evidence list (Dkt. 30), and additional evidence (Dkt. 31-37). The Board held a hearing related to Giardina's request for damages on April 2, 2024, pursuant to an order issued by the Board on March 12, 2024. (Dkt. 38); Evidentiary Hearing (Apr. 2, 2024) (transcript on file with the Copyright Claims Board) ("Trans."). Giardina testified on her own behalf and Katie Hudgins, whose current job title at Petco is "Senior, Social & Content," testified on behalf of Petco. Trans. 1:43-2:02 & 3:48-4:23; *see also* Hudgins Decl.

The case is now ready for final determination.

II. Factual History

Giardina describes herself as a pet influencer. (Dkt. 22 at 24, 26). She regularly collaborates with brands in the pet industry to create customized social media content. *Id.*; Trans. 41:27-42:32, 44:14-38, 48:04-42, 51:21-54:35 & 56:05-58:29. She alleges infringement of a seven-second-long video titled *Getting ready for the Olympics?* (the "Video"), which shows a "harlequin Great Dane jumping over a baby gate/fence." (Dkt. 1) (LoveMargotOlympicsCopyrightedWork.MP4" attachment). Giardina conceived, created, and owns the Video. Giardina Statement ¶ 1; (Dkt. 37 at 6).

The Video was registered by the U.S. Copyright Office with an effective registration date of August 9, 2022 (Registration No. PA 2-369-606), and the Certificate of Registration identifies Giardina as the author of the Video and as the copyright claimant. (Dkt. 1) (CopyrightCertofRegistration.JPG attachment). Although the registration provides a publication date of March 25, 2021, Giardina certified elsewhere that it was first published on March 21, 2021. *Id.*; (Dkt. 37 at 9); Trans. 1:22:04-34. She testified that it was first published on Instagram and other social media platforms, where it quickly went viral. (Dkt. 37 at 9); Giardina Statement ¶¶ 1-2.

Katie Hudgins ("Hudgins"), who was the social media manager of Petco's subsidiary, Pupbox, at the time, reposted the Video on Pupbox's Instagram account on or before April 2, 2021. Hudgins Decl.; (*see* Dkt. 24 at 5). Hudgins states that "the content in question was going viral via several Instagram accounts." Hudgins Decl. Hudgins' Pupbox post tagged Giardina's Instagram account @greatdaneapparel. (Dkt. 22 at 14; *see id.* at 21; Dkt. 24 at 6).

At that time, Giardina was working with one of Petco's direct competitor brands. (Dkt. 22 at 2); Giardina Statement ¶ 7. On April 2, 2021, she learned of the unauthorized post and requested its removal, both in a comment that she added to the Pupbox post, which asserted that it was her work, and in a direct Instagram message telling Pupbox that it needed to remove her Video. (Dkt. 22 at 18-19; Dkt. 24 at 2). Receiving no response, Giardina issued a takedown notice to Instagram later on April 2, 2021, and Instagram removed the Pupbox post later that day. (Dkt. 24 at 5-6); Giardina Statement ¶ 5. During the time that the Video was on the Pupbox page, it received at least 1,567 likes and 35 comments. (Dkt. 22 at 14-15); Trans. 1:01:25-1:02:10.

Hudgins admitted Petco's use of the Video in an email to Giardina that evening. (Dkt. 22 at 21); Giardina Statement ¶ 6. Petco admitted the use again after the Claim was filed: "Petco has investigated your matter internally and determined your content was temporarily shared on the Pupbox Instagram." (Dkt. 24 at 12). Petco contended at one point that "the content was taken down within a few days." *Id.* Petco now asserts that it "strongly believes the content was on Pupbox's Instagram account for less than 24 hours." *Id.* at 2. The precise duration of its use is unclear, as Petco does not provide evidence of when it first posted the Video. (*See* Dkt. 22 at 1).

Petco does dispute Claimant's statement about when the Video was first published. Petco asserted that Giardina published the Video on March 13, 2021. Trans. 1:00:10-40; *see id.* 1:37:47-52 ("Our papers show that the posting was up in at least mid-March . . . ."). To support its position, Petco produced a copy of the April 2, 2021 takedown notice Giardina issued to Instagram, in which she provided a hyperlink to her original post, which supports the March 13 date. (Dkt. 24 at 5-6; *see* Dkt. 22 at 22). Based on the evidence submitted in this proceeding, the Board accepts Petco's assertion and finds that the Video was first published on March 13, 2021.

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 Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

Giardina's copyright ownership is not in dispute and is well supported by evidence. She declares that she is "the creator and original owner of the video in question." Giardina Statement ¶ 1. She testified that she retains ownership of every piece of content that she makes, whether it is a promotional piece for a brand or not. Trans. 45:24-31. Moreover, the Certificate of Registration for the Video lists her as the registrant. Because it was timely obtained, with an effective date of registration less than five years after the Video was first published, the certificate is prima facie evidence both that the copyright is valid and that she owns the copyright. *See* 17 U.S.C. § 410(c).

Petco does not dispute, and in fact admits, that it copied and distributed the Video. *See* Respondent Party Statement at 1 ("Petco . . . acknowledges Ms. Giardina's content was temporarily posted on its subsidiary's Instagram account on April 2, 2021 . . . ."); Hudgins Decl. ("I reposted Ms. Giardina's content . . . ."). Petco also does not

dispute its liability for the Pupbox post. Its counsel Sunayna Ramdeo conceded at the hearing before the Board, "I don't know that we can call it alleged infringement anymore if we're being completely honest with ourselves. . . . It was on our social platform. We admit that." Trans. 1:36:44-54. The copy of the Video that Giardina deposited with the Copyright Office is seven seconds long, and evidence indicates that Petco posted the entire seven-second video on its Pupbox Instagram account. (Dkt. 22 at 15). Therefore, the Board finds that Giardina has established all of the elements of copyright infringement.

IV. Damages

Giardina seeks to recover her actual damages and Petco's additional profits. Statement of Damages Selection. At the damages hearing, Giardina confirmed that she elects to recover actual damages and profits rather than statutory damages. Trans. 5:06-6:28. Petco requests that the Board grant "the minimum award due to her under the law." Response Statement at 1.

"The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b). "'Actual damages' are the extent to which the market value of a copyrighted work has been injured or destroyed by an infringement." *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014) (quoting *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 (9th Cir. 1985)). "Actual damages are usually determined by the loss in the fair market value of the copyright, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer." *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 1994) (quoting *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566 (7th Cir. 2003)). A "causal link between the infringement and the monetary remedy sought is a predicate to recovery of both actual damages and profits." *Id.* The claimant seeking actual damages or recoverable profits must establish that causal connection. *Oracle Corp.*, 765 F.3d at 1087. This "market value approach is an objective, not a subjective, analysis." *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002).

"In a copyright action, a trial court is entitled to reject a proffered measure of damages if it is too speculative." *Frank Music*, 772 F.2d at 513. "'Damages must be proved, and not just dreamed.'" *Polar Bear*, 384 F.3d at 710

(quoting *MindGames, Inc. v. Western Pub. Co.*, 218 F.3d 652, 658 (7th Cir. 2000)). However, "[c]alculation of damages under section 504(b) does not require mathematical precision." *L.G. Textile v. Premier Fabrics, Inc.*, No. CV1405157SJOAGRx, 2015 WL 13917629, at *7 (C.D. Cal. Dec. 21, 2015) (citation omitted).

"[T]he basic rule for computing injury to the market value of a copyrighted work arising from infringement is to inquire what revenue would have accrued to plaintiff but for the infringement." *Rearden LLC v. Walt Disney Co.*, No. 17-cv-04006-JST, 2023 WL 8261299, at *2 (N.D. Cal. Nov. 29, 2023) (quoting 5 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14:02 (2023)). As long as there is proof to support it, actual damages can be based on a hypothetical license: "Although 'actual damages' can be awarded in the form of lost profits, hypothetical-license damages also constitute an acceptable form of 'actual damages' recoverable under Section 504(b)." *Oracle*, 765 F.3d at 1087 (citing *Polar Bear*, 384 F.3d at 708-09). To calculate the "market value" of the plaintiff's injury to the plaintiff based on a hypothetical-license theory, courts look to "the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by [the infringer] of the plaintiff's work." *Wall Data Inc. v. L.A. County Sheriff's Dep't*, 447 F.3d 769, 786 (9th Cir. 2006) (internal citations omitted). Under a hypothetical license theory, there is no requirement that either party would in fact have been willing to license: "Hypothetical-license damages assume rather than require the existence of a willing seller and buyer." *Oracle*, 765 F.3d at 1088. "The 'reasonable market value' of a hypothetical license may be determined by reference to similar licenses that have been granted in the past or 'evidence of "benchmark" licenses in the industry approximating the hypothetical license in question.'" *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *24 (C.D. Cal. July 14, 2015) (quoting *Oracle*, 765 F.3d at 1093).

Giardina states that her "standard fee for the creation and usage of similar videos falls within the range of $16,000 to $18,000," and "an estimated range of my licensing fees would be between $6,500 and $8,000 per sponsored post annually or a percentage of content usage spend, depending on the brand and campaign specifics." (Dkt. 37 at 12). However, Giardina provided evidence that she contracts with pet brands to provide <u>branded</u> social media content. For example, on August 15, 2021, she received a $13,281 "payment from a brand on a collaboration," specifically a pet brand, for which she produced and posted a video on Instagram. Trans. 41:27-

42:32 & 44:14-38; (*see* Dkt. 22 at 29). On the same date, she received $16,850 for producing and posting a similar video on Instagram for a different pet brand. Trans. 49:30-50:28 & 50:49-54; (*see* Dkt. 22 at 30). These videos involved "either a product placement or brand integration within the video," showing Giardina "utilizing the product with my dogs." Trans. 50:29-49. The Video at issue here, however, was neither created as part of a "brand campaign" nor as a product placement. Indeed, the Video does not display any brand indicia or pet product. (Dkt. 1) ("LoveMargotOlympicsCopyrightedWork.MP4" attachment). Thus, such licensing is not an appropriate measure of any actual damages the infringement caused. Trans. 37:13-23.

For unbranded content, Giardina provided evidence that Instagram has awarded her bonus payments through its Reels Play program, which "rewarded creators with a pay-per-view bonus for their popular reels [videos]." Giardina Reply Statement ¶ 2. Qualifying reels would "earn money based on the number of plays." (Dkt. 22 at 12, 20). Giardina testified that videos that were made as part of paid partnerships were not eligible for payments from this "creator fund." Trans. 36:21-37:12, 53:06-18. "But if it was an unbranded and unpaid partnership," she would be paid "through the Instagram bonus program." *Id.* at 49:00-19. A statement from Instagram shows that it paid her at least nine bonuses, including one for $13,027.99. (Dkt. 22 at 35). She testified that any bank record showing a deposit into her account from Instagram, Facebook, or Meta was such a "creator bonus payment" for a particular video, including a $13,170.58 payment received on November 29, 2021. Trans. 23:10-25:30; (Dkt. 22 at 28). However, she did not submit evidence of any amount she was paid as a bonus for the Video. Trans. 32:58-33:11. In addition, while her Instagram bonuses were based on how often her works were viewed, Giardina did not provide evidence of the rate per view, or of how many views Petco's infringing use obtained. There is therefore no evidence as to any amount she lost because the Video was viewed on Petco's account rather than hers, and the bonuses she received for other Instagram posts do not indicate what a negotiated license for the Video might have garnered from a willing licensee.

In addition, Giardina testified that she was paid such bonuses monthly and that no more payments were made based on views of a particular video after 30 days. Trans. 34:33-53, 35:14-36:20. She also testified that the 72-hour period after a post was "the most vital; that's really when you get the most exposure, the biggest reach, and the

highest amount of views," and that a duplicate post of viral content during those first 72 hours would decrease views of the original post. *Id.* at 37:38-38:09. Evidence indicates that Petco's infringement began after that period passed. Her Video was posted on Instagram on March 13, 2021, and there is no evidence that Petco's infringing use lasted more than "a few days" before it was taken down on April 2, 2021. Trans. 1:00:10-40; (Dkt. 24 at 5-6, 12). The effect of that infringing post on Giardina's Instagram bonus would be negligible at best. As a result, evidence of Giardina's Instagram bonuses is not a reliable basis to measure her actual damages in this case.

Giardina also submitted evidence of Petco's revenue growth in the fiscal quarter when the infringement occurred. (Dkt. 32); (Dkt. 33); (*see* Dkt. 28 at 2). However, no facts in evidence show that any fraction of Petco's revenues can be directly attributed to the infringing use of the Video.

Better evidence is found in Petco's licensing history. Petco recognized that the Video "was going viral via several Instagram accounts at the time of posting" on its Pupbox Instagram account. Hudgins Decl.; (*see also* Dkt. 22 at 1 (contending Petco was "fully aware that this particular video was gaining momentum and going viral" and chose to capitalize on its virality)). Giardina contends, and Petco does not dispute, that its choice "to infringe upon this particular video . . . indicates recognition of its significant value." (Dkt. 24 at 4); (Dkt. 22 at 1). Indeed, the Video received more Instagram likes and comments in its short time on the Pupbox account page than several branded Pupbox posts from the same time period, which Giardina characterizes as "Pupbox stagnant posts on or around the date of infringement," have received over several years. (Dkt. 22 at 14-15); (Dkt. 30); (Dkt. 34). Because the Video is the type of content that Petco sees fit to post on its Instagram page, the rates that it pays for social media content can inform a reasonable benchmark for what it would have paid for a hypothetical negotiated license.

Petco asserts that after the claim was served, it "conducted market research on how much an influencer of Ms. Giardina's status would typically be paid for a post." Response. (*See also* Dkt. 22 at 11 (Petco email dated March 27, 2023, stating "[w]e've done a review of our social media influencer compensation structure for a one-time post, as well as industry standards on this topic")). Petco emailed Giardina on April 5, 2023, stating, "in our experience, which we can support with evidence, a typical license payment for your photograph at issue would be no more than $2,500."

(Dkt. 22 at 9). (Giardina noted in response that "it was a motion picture that was infringed – not a 'photograph.'" *Id.* at 8.)

Evidence indicates that $2,500 is in the ballpark of what Petco in fact pays influencers like Giardina to generate pet-related social media content when that content is branded specifically for Petco. Petco pays marketing agencies to license influencers to create online content for Petco on social media; Hudgins testified that "the main focus for these campaigns is content creation for us to utilize." Trans. 1:10:36-56. In one recent Statement of Work, Petco agreed to pay an agency $350,000 for a one-month campaign during which 30 to 40 influencers (who varied from celebrities to "Micro-Tier Influencers") would each create three or four pieces of branded content, or on average, somewhere between $2,187.50 and $3,888.89 per piece of content, of which 60% were to be posted on Instagram and 40% on other platforms. (Dkt. 36 at 4-10). In another Statement of Work, Petco agreed to pay a media company $615,000 to provide and/or source, from commissioned creators, 240 pieces of branded content to be posted on Petco's TikTok channel over a period of six months, or on average, $2,562.50 per post. *Id.* at 12-15).

These Petco licensing agreements provide a plausible starting basis to estimate Giardina's lost profits attributable to the infringement. Petco regularly pays such rates to license social media content that has not yet been created, in bulk, and of unpredictable popularity. Here, Petco chose content that it knew was already going viral. Indeed, the Video garnered more attention for Pupbox than typical Pupbox posts.

However, the rates that Petco pays influencers to generate social media content are not directly equivalent to what it would have paid, or what Giardina would have received, for a hypothetical license to use the Video. The Giardina licenses in evidence are for branded content and she has offered no evidence of licensing previously-created, non-branded content to companies. The Petco license agreements in evidence are also for branded content that advertises Petco or discloses Petco's sponsorship. (*See* Dkt. 36 pp. 8, 12, 16, 20, 24, 25, 29, 30, 34). Giardina's Video is not branded content, and it does not advertise any product or business. There is no evidence in this proceeding that Petco, or any comparable entity, ever pays to license unbranded social media content. In addition, the $350,000 and $615,000 Petco licenses in evidence seem to anticipate that the influencer content would remain online for at least several months during and after their respective campaigns. (*Id.* at 4-10, 12-15). There is no

evidence that Petco's infringing use of the Video lasted more than "a few days." (Dkt. 24 at 12). Petco admits that $2,500 is within the range of what it pays to license social media content, per piece of content, and has submitted evidence that confirms it, but there are significant differences between the infringing use and the use covered by Petco's licensing agreements. Taking all of the foregoing factors into consideration, the Board finds that it would be appropriate and sufficiently supported by the evidence to award 33% of $2,500 or $825.

V. Conclusion

The Board finds Respondent Petco Animal Supplies Stores, Inc. liable for copyright infringement and awards Claimant Sabrina Giardina $825 in actual damages.

Copyright Claims Board