COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0382
October 15, 2024

Tamara Wareka	*v.*	Sabrina Carroll
CLAIMANT		**RESPONDENT**

PROPOSED DEFAULT DETERMINATION

Respondent, Sabrina Carroll ("Carroll" 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, Tamara Wareka ("Wareka" 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 Wareka and awards $11,000 in statutory damages. **Any determination against Carroll, including a monetary award for damages, will be enforceable in a court of law.**

I. Procedural History

This claim was filed on November 10, 2023. Claim (Dkt. 1). The Board found the Claim compliant and, on November 27, 2023, directed Wareka, who also goes by Tamara Williams, to serve Carroll within ninety days. (Dkt. 4). Wareka filed a Proof of Service on January 26, 2024, which affirmed that Carroll was served on January 18, 2024 by personal service. (Dkt. 5).

The Board sent a Second Notice to Carroll by mail and email on February 14, 2024 (Dkt. 6). The Board did not receive an opt-out form from Carroll.

On March 19, 2024, the Board notified the parties that the proceeding had entered the "active phase" because Carroll did not submit a timely opt-out, and it ordered Wareka to pay the second filing fee and Carroll to register for the Board's online docketing system (eCCB). (Dkt. 7). Claimant paid the second filing fee that day. (Dkt. 8). On

April 3, 2024, the Board issued a Scheduling Order (Dkt. 9) and a Second Notice directing Carroll to register for eCCB. (Dkt. 10). The Board issued all of the foregoing orders through eCCB and also mailed and emailed them to Carroll.

In the Scheduling Order, Carroll was ordered to submit a response by May 3, 2024, but Carroll did not. Both parties were also ordered to attend a pre-discovery conference to be held on May 15, 2024. While Wareka attended the May 15 Conference, Carroll did not.

On May 20, 2024, the Board issued its First Default Notice because Carroll did not meet any of the mandatory deadlines set by the Board. (Dkt. 11). The First Default Notice gave Carroll another thirty days to file a response and register for eCCB. *Id.* On June 3, 2024, the Board issued its Second Default Notice, which reminded Carroll of the June 20, 2024 deadline to cure the missed obligations. (Dkt. 12). These notices were issued through eCCB and sent to Carroll via email as well as by U.S. mail.

Carroll failed to file a response or register for eCCB by June 20, 2024. The Board received no communication from Carroll at all. Accordingly, on June 21, 2024, the Board ordered Wareka to submit written direct testimony in support of a default determination. (Dkt. 13).

Wareka submitted the required written materials on August 5, 2024, consisting of a party statement, two witness statements, an evidence list, and evidence. (Dkt. 14-17). On August 7, 2024, the Board issued an Order to Submit Additional Evidence. (Dkt. 18). That order allowed Wareka to submit additional evidence and argument on three subjects. First, given that Wareka claimed that she was told by her licensing agent about the alleged infringement on November 22, 2020, and the Claim was filed on November 10, 2023, Wareka was allowed to submit additional materials related to her discovery of the alleged infringement and the statute of limitations. Second, Wareka was allowed to submit additional materials tying Carroll to the alleged infringement as opposed to the infringement being done solely by the business known as Sky Lounge Skin Care ("Sky Lounge"). Third, Wareka had submitted two licenses as evidence of harm, but those licenses were heavily redacted, and it was unclear whether the uses in those licenses were comparable to the use of her works in the alleged infringements. *Id.* Wareka was therefore allowed to submit additional materials related to harm or to reduce the redactions in the already submitted materials.

On August 20, 2024, Wareka submitted additional materials consisting of a supplemental party statement, two witness statements, and evidence. (Dkt. 19-22). These materials mainly addressed the first two subjects in the Order to Submit Additional Evidence as Wareka declined to submit new materials on damages, with her lawyer asserting that the Board had what it needed to make a damages determination. Second Declaration of Taryn R. Murray ¶¶ 17-19 ("Second Murray Decl.") (Dkt. 20).

II. Factual History

Tamara Wareka is a professional photographer, specializing in "beauty photography," who does work for well-known international publications and various high-end brands for commercial use. Declaration of Tamara Williams ("Wareka Decl.") ¶¶ 3, 6 (Dkt. 17). Wareka typically retains the copyright to all of her photographs and owns the copyright in five close-up photographs of models' faces (the "Works"). *Id.* ¶¶ 4, 7-23; Exhibits D-K (Dkt. 16). The Works are part of four different registrations. The "Mae Photograph" (Ex. D) was registered by Wareka as a part of a group registration of 36 published photographs (Reg. No. VA 2-116-918) (Ex. E). *See also* Wareka Decl. ¶¶ 7-10. The effective date of registration is August 23, 2018, and the registration states that the group of works was published between March 13, 2018 and August 9, 2018. The "Hilda Photographs" (Ex. F) were registered by Wareka as a part of a group registration of 100 published photographs (Reg. No. VA 2-116-887) (Ex. G). *See also* Wareka Decl. ¶¶ 11-14. The effective date of registration is August 23, 2018, and the registration states that the group of works was published between January 4, 2018 and August 9, 2018. The "Blonde Photograph" (Ex. H) was registered by Wareka as a part of a group registration of 241 published photographs (Reg. No. VA 2-114-445) (Ex. I). *See also* Wareka Decl. ¶¶ 15-18. The effective date of registration is August 2, 2018, and the registration states that the group of works was published between March 1, 2016 and December 1, 2016. The "Nabla Photograph" (Ex. J) was registered by Wareka as a part of a group registration of 31 published photographs (Reg. No. VA 2-116-904) (Ex. K). *See also* Wareka Decl. ¶¶ 19-22.[1] The effective date of registration is August 23, 2018, and the registration states that the group of works was published between February 11, 2018 and June 12, 2018.

[1] Wareka Decl. ¶ 21 accidentally refers to the "Beauty Photograph" as opposed to the Nabla Photograph, but the evidence is clear.

Wareka employs a third-party licensing agent, Lauren Kelly, to investigate infringements and negotiate licenses. Wareka Decl. ¶ 24; Declaration of Lauren Kelly ¶¶ 2-3 ("Kelly Decl.") (Dkt. 22). On November 22, 2020, Kelly discovered the Works on the Facebook pages of Sky Lounge (Ex. L & M), checked that she had no record of licenses to Sky Lounge and informed Wareka. Wareka Decl. ¶¶ 24, 30; Kelly Decl. ¶¶ 4-5; Supplemental Exhibit A (Dkt. 21). The Mae Photograph (on October 17, 2018) and one of the Hilda Photographs (on September 26, 2018) were used to promote a buy one service and get another service for 50% off special. The other Hilda Photograph (on April 1, 2019), the Blonde Photograph (on August 5, 2019), and the Nabla Photograph (on October 26, 2019) were used in more general Facebook posts advertising the Sky Lounge. Wareka Decl. ¶¶ 25-28; Exhibits L & M.

Sky Lounge was an LLC—Sky Lounge Skin Care LLC—until its failure to file a property return for 2020. First Declaration of Taryn R. Murray ¶ 10 ("First Murray Decl.") (Dkt. 14); Exhibit B (Dkt. 16). Carroll then continued to operate the business as an individual. First Murray Decl. ¶ 11. Wareka has submitted evidence to show that Sky Lounge lists Carroll on both its Facebook page and its website as its "sole owner and founder," and that Carroll presents herself as being Sky Lounge's sole owner since 2009. Second Murray Decl. ¶¶ 6-8, 13-14; Supplemental Exhibits D & F (Dkt. 21). At least as of recently, Carroll also appears to be the only person one could book a treatment with at Sky Lounge. Second Murray Decl. ¶¶ 15-16. Carroll's personal Facebook page has linked to Sky Lounge's Facebook page on multiple occasions. *Id.* ¶¶ 11-12; Supplemental Exhibit E (Dkt. 21).

Wareka, through Lauren Kelly, attempted to resolve this matter, but then referred the matter to an attorney. Kelly Decl. ¶¶ 6-7, 9-10; Supplemental Exhibit B (Dkt. 21). When Sky Lounge finally responded to the attorney's emails, that communication was made by Carroll, who said that she did not create the allegedly infringing content "on my own," and that she was "using a company" to which she would reach out to confirm that they had rights to use the Works; however, she did not send any further information. Kelly Decl. ¶¶ 11-15; Supplemental Exhibit C (Dkt. 21). As the statute of limitations was approaching, Wareka's current counsel was retained, and this proceeding was filed. Kelly Decl. ¶¶ 17-18. There is no evidence to suggest that the alleged infringements should have been discovered before Lauren Kelly discovered them on November 22, 2020, and therefore there is no statute of limitations issue in this case.

Wareka has submitted two heavily redacted invoices showing that she licensed similar "beauty" photographs in 2018 and 2020. Wareka Decl. ¶¶ 36-40; Exhibits N & O (Dkt. 16). Exhibit N does not say how many images were licensed, but Wareka states it was a single image and the license has a copy of a single image on the license with a single "asset unique ID." Wareka Decl. ¶ 37; Exhibit N. The license charged $5,600 for a three-year global license throughout the Internet and for "PR," but not other "direct advertisement rights," and allowed the use of the photograph in a "single industry market per year." Wareka Decl. ¶ 37; Exhibit N. Exhibit O is also for the use of a single image. Wareka Decl. ¶ 39; Exhibit O. The license charged $9,700 for a one-month license but for a substantially broader use than at issue in this case. Wareka Decl. ¶ 39; Exhibit O. The license allowed a Canadian drug company to use the image in three beauty stores, on social media, and in email blasts that would go to approximately 500,000 customers. Wareka Decl. ¶ 39; Exhibit O.

Wareka is seeking $50,000 in statutory damages. Default Direct Party Statement at 8-9. (Dkt. 15). That is obviously well outside the maximum amount that the Board can award in a proceeding, but it does confirm Wareka's election for statutory damages.

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). Wareka submitted Certificates of Registration for the Works, all of which were timely obtained (before or within five years of first publication of the work). 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). Furthermore, neither the copyrightability of Wareka's Works nor the ownership of the Works is in question.

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)).

Wareka has demonstrated that, without her consent, there was a reproduction and public display of a copy of each of the Works on the Sky Lounge social media pages. Wareka Decl. ¶¶ 25-34; Exhibits L & M. There is no question that in each instance the original and infringing photos are identical, and thus both strikingly and substantially similar.

While it is clear that Sky Lounge Skin Care LLC—which was an operating entity when the infringements took place in 2018 and 2019—would be liable for infringement, there is a question as to whether Respondent, an individual, is liable for those acts. Carroll is not liable merely because she was the sole owner of Sky Lounge Skin Care LLC at the time of the infringements or because she continued to own the business after Sky Lounge's LLC status was forfeited. If that were the case, corporate formalities could easily be ignored as a matter of course. The question here is whether Carroll can be found liable under principles of vicarious liability when there is no evidence that she made the posts herself.

The application of individual vicarious liability requires evidence that the individual "has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity." *Erickson Productions, Inc. v. Kast*, 921 F.3d 822, 829 (9th Cir. 2019) *(*quoting *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 745 (9th Cir. 2019)).[2]

[2] Both *Erickson* and other cases sometimes refer to "direct financial interest" as "direct financial benefit."

As to supervisory control, "[v]icarious copyright liability—even of corporate officers—does not require knowledge that the conduct is infringing." *Netbula, LLC v. Chordiant Software, Inc.*, NO. C 08-0019 JW, 2009 WL 750201, at *2 (N.D. Cal. Mar. 20, 2009). *See also Joint Stock Co. Channel One Russia Worldwide v. Infomir LLC*, 16-CV-1318, 2017 WL 696126, at *17 (S.D.N.Y. Feb. 15, 2017); *Altmmayer-Pizzorno v. L-Sift Int'l, Inc.*, Civ. No. PJM 02-1556, 2003 WL 27386642, at *2 (D. Md. May 2, 2003). However, there must be more than an officer's mere right and ability to supervise the corporation's conduct generally. A plaintiff must show "that the defendant had supervisory power over the infringing conduct itself." *Netbula* at *2.

As to financial interest, "the crux of the financial benefit inquiry is whether a causal relationship exists between the infringing activity and a financial benefit to the defendant. If copyright infringement draws customers to the defendant's service or incentivizes them to pay more for their service, that financial benefit may be profit from infringement. But in every case, the financial benefit to the defendant must flow directly from the third party's acts of infringement to establish vicarious liability." *Sony Music Enter. v. Cox Commn's, Inc.*, 93 F.4th 222, 231-32 (4th Cir. 2024). *See also Universal Furniture Int'l, Inc. v. Frankel*, 538 Fed. Appx. 267, 272 (4th Cir. 2013) (quoting *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 513 (4th Cir. 2002)).

Based on the standards and analysis in the above-cited cases and others, including in Maryland where Respondent is located, *see, e.g., Goldstein v. Metropolitan Regional Information Sys., Inc.*, Civ. No. TDC-15-2400, 2016 WL 4257457 (D. Md. Aug. 11, 2016)*; J&J Sports Productions, Inc. v. Beer 4 U, Inc.*, Civ. No. TDC-18-2602, 2019 WL 5864499 (D. Md. Nov. 8, 2019), the Board is persuaded that Claimant has presented enough evidence to *just barely* hurdle the bar that is the preponderance of evidence standard. Unlike, for instance, a business that has various employees who may have directed or supervised the infringement, there is no evidence to suggest that anyone at Sky Lounge other than Carroll would have been involved in the infringement (and there is no evidence Sky Lounge even has employees beyond Carroll). She presents herself as the "founder," "owner," and "operator" of the business known as Sky Lounge Skin Care, LLC, and her current Facebook "About" page says that has been the case since Sky Lounge's opening in 2009. Exhibit A (Dkt. 16); Supplemental Exhibits D-F (Dkt. 21); Second Murray Decl. ¶¶ 3, 13. At least currently, she appears to be the only one with whom a customer could book salon services

at Sky Lounge. Second Murray Decl. ¶ 16. Also at least currently, she links her personal Facebook page to the Sky Lounge social media page where the infringements occurred, including on her "About" page. *Id.* ¶¶ 10-12; Supplemental Exhibit E. Most important, however, is her apparent supervision of the activity in question. While the evidence suggests that a third-party marketing company may have created the infringing posts and chose the photographs, it also shows that Carroll hired and worked with the marketing company and must have either given them authorization to create the Sky Lounge social media page or, if it was previously created, given them access to that page. Supplemental Exhibit C. Carroll, in an email, deflects responsibility to the marketing company but admits that she hired them and that she would be the one to reach out to them. *Id.* She also admits involvement, just saying that she didn't create the content "on my own." *Id.* The evidence therefore suggests that she supervised the infringing actions and could easily have stopped the marketing company's access and their posts. Finally, the posts themselves are specific to revenue-generating activity, including advertising specific sales and promotions for the company of which she was the sole owner—and, based on the evidence, the information for the specific posts at issue was likely given to the marketing company by Carroll. *Id.*; Exhibits L-M.

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. As discussed above, there is no reason to suspect that the infringement was or should have been discovered prior to November 22, 2020. There is also enough evidence to find Carroll individually liable for the infringements.

V. Damages

Wareka elects statutory damages, but requests $50,000. Default Direct Party Statement at 8-9. Although the maximum amount of statutory damages for each of the Works in question is $15,000 given that they were all registered before the infringements presented took place, 17 U.S.C. § 1504(e)(1)(A)(ii)(I), the maximum total recovery for any CCB proceeding is $30,000. 17 U.S.C. § 1504(e)(1)(D). As such, Wareka's total damages is capped at

that amount even if the Board were to determine that she was entitled to more than $6,000 per each of the five works infringed.

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; 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. *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).

Wareka has provided the Board two license invoices in an attempt to show her lost license fee in this proceeding. S*ee* Wareka Decl. ¶¶ 36-40; Exhibits N & O (Dkt. 16). These invoices are heavily redacted, although they do appear to give information on the amount charged and the general type of use allowed. Wareka was given the opportunity to submit additional licenses that might be closer to the use at issue in this proceeding or to unredact some of the missing information in the licenses produced. (Dkt. 18). In a declaration supplied by her attorney, Wareka declined to do so, believing the Board had enough to make a determination. Second Murray Decl. ¶¶ 18-19. As such, the Board will extrapolate from the two invoices provided.

Exhibit O is of little use in determining damages in this proceeding. While the license does include social media use, putting aside that the social media use allowed appears unlimited, it seems highly likely that the core purpose of the license was to use the image in "stand alone beauty stores" as well as "email blasts" (plural, not singular) to approximately 500,000 customers. Exhibit O. As such, and given that there is another more-relevant license, the Board essentially disregards Exhibit O—and if the Board were to need to use Exhibit O, no more than one-tenth of the $9,700 amount (i.e., $970) could be attributed to a use similar to the one at issue in this proceeding.

Exhibit N is more useful although not entirely clear. Although the invoice does not mention the company licensing the image or the precise uses made of the image, Wareka states that the invoice represents a license to "a skin care company." Wareka Decl. ¶ 37. The invoice states that the license is for "1 year per market staggered over 3 years globally Pr and global web, no advertising, no media buys." Exhibit N. Wareka states that the "per market staggered over 3 years" means "a single industry market per year." Wareka Decl. ¶ 37. The invoice states that the license fee was $5,600. Exhibit N.

The Board cannot fully discern the complete extent of the licensed use, and Wareka has declined the Board's request for additional information. It is also unclear what "no advertising" and "no media buys" means when the granted license is for clearly use on the internet for "PR" throughout the world.

Therefore, the Board is left with attempting to construct a fair statutory damages award from two licenses that

show that Wareka has at least twice been paid large sums for widespread, but not analogous, uses of a single image. Based on its judgment after a review of Exhibit N, the Board determines that the best approximation of Wareka's lost licensing fee is $1,100 per work. This represents approximately 20 percent of the $5,600 license fee in Exhibit N, which also includes internet use but appears to contemplate a much more widespread use than the one at issue in this proceeding.

Furthermore, there were five works infringed, but all used within a short time frame for the same purpose in single Facebook posts. Given that the Board has wide discretion to "consider what is just in the particular case," awarding damages approximately two times Wareka's lost license fee per work times five works in this case is appropriate to deter Carroll and others from using Wareka's images without paying the appropriate license fees. Carroll clearly used the Work to market Sky Lounge's services. Wareka is a professional photographer who licenses photographs and designs to various publications and business entities for editorial and commercial uses, and her ability to continue to license photographs depends, in part, on the enforcement of unlicensed usage of her photos; otherwise, others will believe they can utilize Wareka's photos for commercial purposes without paying any license fees.

Based on the record before it, the Board awards a total of $11,000, which is approximately two times the amount of the proven actual damages of Wareka per work for each of the five Works.

VI. Conclusion

The Board's proposed default determination is to find that Carroll has committed copyright infringement and award Wareka $11,000 in statutory damages.