COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0381
November 12, 2024

Gavin O'Neill	*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 requires the claimant to submit written direct testimony. 17 U.S.C. § 1506(u)(1); 37 C.F.R. § 227.2(a). The claimant, Gavin O'Neill ("O'Neill" 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 O'Neill and awards $1,200 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 21, 2023, directed O'Neill to serve Carroll within ninety days. (Dkt. 4). O'Neill 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 O'Neill 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 16, 2024. While O'Neill's counsel attended the May 16 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 O'Neill to submit written direct testimony in support of a default determination. (Dkt. 13).

O'Neill 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 O'Neill to submit additional evidence and argument on three subjects. First, given that O'Neill claimed that he was told by his licensing agent about the alleged infringement on November 22, 2020, and the Claim was filed on November 10, 2023, O'Neill was allowed to submit additional materials related to his discovery of the alleged infringement and the statute of limitations. Second, O'Neill was allowed to submit additional materials that would show Carroll was personally liable for the alleged infringement as opposed to liability being solely for the business known as Sky Lounge Skin Care ("Sky Lounge"). Third, O'Neill had submitted two license invoices as evidence of harm, but they were heavily redacted, and it was unclear whether the uses in those licenses were comparable to the allegedly infringing use of his work; O'Neill was therefore allowed to submit additional materials related to harm or to reduce the redactions in the already submitted materials. *Id.*

On August 20, 2024, O'Neill submitted additional materials consisting of a supplemental party statement, two witness statements (from his attorney and from Lauren Kelly), and evidence. (Dkt. 19-22). These materials mainly addressed the first two subjects in the Order to Submit Additional Evidence. Through his attorney, O'Neill asserted that the Board had what it needed to make a damages determination in the redacted documents and declined to submit new materials on damages. Second Declaration of Taryn R. Murray ¶¶ 17-19 ("Second Murray Decl.") (Dkt. 20).

II. Factual History

Gavin O'Neill 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 Gavin O'Neill ("O'Neill Decl.") ¶¶ 3, 6 (Dkt. 17). O'Neill typically retains the copyright to all of his photographs and owns the copyright in a photograph of a woman with a flower resting between her legs (the "Work"). *Id.* ¶¶ 4, 7; Exhibit D (Dkt. 15). O'Neill registered the copyright for the Work as part of a group of photographs (Reg. No. VA 2-066-264). Exhibit E (Dkt. 15); O'Neill Decl. ¶¶ 9-10. The effective date of registration is August 31, 2017, and the registration states that the photographs were published in 2016. Exhibit E.

O'Neill employs a third-party licensing agent, Lauren Kelly, to investigate infringements and negotiate licenses. O'Neill Decl. ¶¶ 11, 14; Declaration of Lauren Kelly ¶ 2 ("Kelly Decl.") (Dkt. 22). On November 22, 2020, Kelly discovered the Work on the Facebook pages of Sky Lounge; after she confirmed with O'Neill that he had no record of licenses with Sky Lounge, she requested information from Sky Lounge, but received no response. O'Neill Decl. ¶¶ 11-17; Kelly Decl. ¶¶ 3-8; Exhibit F (Dkt. 15); Supplemental Exhibits A-B (Dkt. 21). The Work was used to promote a buy one service and get another service for 50% off special. O'Neill Decl. ¶ 12; Exhibit F.

Sky Lounge was an LLC organized under the laws of Maryland—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. 15). Carroll then continued to operate the business as an individual. First Murray Decl. ¶ 11. O'Neill 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 with whom one could book a treatment 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).

O'Neill, through Lauren Kelly, attempted to resolve this matter, but then referred the matter to an attorney. Kelly Decl. ¶¶ 5-6, 9; 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. ¶¶ 9-15; Supplemental Exhibit C (Dkt. 21). As the statute of limitations was approaching, O'Neill's current counsel was retained, and this proceeding was filed. Kelly Decl. ¶¶ 16-17. 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.

O'Neill has submitted two heavily redacted invoices showing that he licensed similar "beauty" photographs in 2018 and 2019. O'Neill Decl. ¶¶ 18-23; Exhibits G & H (Dkt. 15). Exhibit G, the 2019 license invoice, does not say how many images were licensed, but O'Neill states it was a single image and the license invoice shows a copy of a single image with a single "Asset Unique Identifier." O'Neill Decl. ¶¶ 19-20; Exhibit G. The invoice charged 16,500 Euros (approximately $18,150 as of the invoice date) for six months of exclusive use. O'Neill Decl. ¶ 19; Exhibit G. O'Neill states that the license was for use on "all digital platforms," but that is not the totality of what the invoice says. *Id.* The invoice states that the licensed use is "print" use, including up to 500 Point of Sale (POS) prints in Italy and up to 1000 Point of Sale prints in France. Exhibit G. The invoice also says "All digital," *id.*, but it is unclear what that means—as in, whether the license allows "all digital platforms" in addition to the print uses, or whether it is a digital image to be used in print formats, or something else. The most logical explanation is that it includes both the Point of Sale print uses and all digital uses. O'Neill has chosen not to explain the discrepancy even though he was given the opportunity to put in additional witness statements or evidence on damages.

Exhibit H, the 2018 license invoice, shows three different images, each with its own Asset Unique Identifier, charging different prices for each. Exhibit H. Only one of the three images appears to be licensed by O'Neill, with the other two being licensed by the same licensing agent on behalf of other photographers. *Id.* Each of the three images in Exhibit H appears to be licensed for publication in a French magazine, and while the other two photographers charged 350 Euros (approximately $450 as of the invoice date) for one of the images to be used in a quarter-page print in the magazine and 450 Euros (approximately $590) for one of the images to be used in a half-page print in the magazine, O'Neill charged 1,000 Euros (approximately $1300) for one of his images to be used in both a quarter-page print and a full-page print in the magazine. *Id.* In his declaration, O'Neill describes only the license for which he charged 1,000 Euros, but the overall license invoice suggests that the licensing agent charged 350-1,000 Euros per image depending on the size to be used in the magazine. *Id.*; O'Neill Decl. ¶¶ 21-22.[1]

O'Neill is seeking $15,000 in statutory damages, which is the maximum amount for which he is eligible. Default Direct Party Statement at 7-8 (Dkt. 16).

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). O'Neill submitted a Certificate of Registration for the Work, which was timely obtained 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. 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 O'Neill's Work nor the ownership of the Work is in question.

[1] The magazine name is redacted in the section of the license invoice pertaining to O'Neill's image, but it is not redacted in the other two sections. Exhibit H. O'Neill chose not to unredact the magazine name in response to the Board's Order to Submit Additional Evidence, but gives no reason to think that the licensee for his image (with the exact same Client ID and billed to the same redacted entity) was not also the widely-distributed French magazine, *Version Femina*.

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 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A][1] (2019)).

O'Neill has demonstrated that, without his consent, there was a reproduction and public display of a copy of the Work on the Sky Lounge social media page. O'Neill Decl. ¶¶ 11-17; Exhibit F. There is no question that 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 infringement took place in 2019—would be liable for infringement, there is a question as to whether Respondent, an individual, is liable for the infringement. Carroll is not liable merely because she was the sole owner of Sky Lounge Skin Care LLC at the time of the infringement 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 post herself.

The application of individual vicarious liability requires proof 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] *See also Nelson-Salabes, Inc. v. Morningside Development, LLC*, 284 F.3d 505, 513 (4th Cir. 2002).

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 08-00019 JW, 2009 WL 750201, at *3 (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); *Altmayer-Pizzorno v. L-Soft 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"; the claimant must show that the individual "had supervisory power over the infringing conduct itself." *Netbula*, 2009 WL 750201, 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 Entertainment v. Cox Communications, Inc.*, 93 F.4th 222, 231-32 (4th Cir. 2024) (citations omitted).

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, at *5 (D. Md. Aug. 11, 2016); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004), the Board is persuaded that Claimant has presented enough evidence to *just barely* hurdle the bar that is the preponderance of evidence standard (more likely than not) to establish Carroll's vicarious liability. 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"

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

page says that has been the case since Sky Lounge's opening in 2009. Exhibit A (Dkt. 15); Supplemental Exhibits D-F (Dkt. 21); Second Murray Decl. ¶¶ 3, 5-6, 10, 12, 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. ¶¶ 15-16. Also at least currently, she links her personal Facebook page to the Sky Lounge social media page where the infringement 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 post and chose the photograph, 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 appears to admit involvement, just countering in her email 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 post itself is specific to revenue-generating activity, including advertising a specific sale for the company of which she was the sole owner—and, based on the evidence, the information for the specific post at issue was likely given to the marketing company by Carroll. *Id.*; Exhibit F.

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 infringement.

V. Damages

O'Neill elects statutory damages and requests $15,000. Default Direct Party Statement at 7-8. This is the maximum amount of statutory damages possible for infringement of the Work given that it was registered before the infringement took place. 17 U.S.C. § 1504(e)(1)(A)(ii)(I).

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 damages 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).

O'Neill has provided the Board two license invoices in an attempt to show his lost license fee in this proceeding. S*ee* O'Neill Decl. ¶¶ 18-24; Exhibits G & H (Dkt. 15). These invoices are heavily redacted, although they do appear to give information on the amount charged and the general type of use allowed. O'Neill 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 his attorney, O'Neill declined to do so, seemingly believing the Board had enough to make a determination. Second Murray Decl. ¶¶ 17-19. As such, the Board will review the two license invoices presented to see if it can extract any relevant information to determine O'Neill's lost license fee.

Unfortunately, the two licenses are for uses so different than the use at issue that they are of almost no use in determining damages in this proceeding. The use at issue in this proceeding is a single social media post advertising "today" a buy one service and get another one 50% off special. Exhibit F.

O'Neill charged 16,500 Euros for the use in Exhibit G, the 2019 license invoice. However, that invoice was for an exclusive license of the image involved and was for "print" use at 1,500 Point of Sale locations in France and Italy. Exhibit G. O'Neill also states that the license included use on "all digital platforms." O'Neill Decl. ¶ 19. It is unclear why O'Neill's declaration does not also mention the Point of Sale print uses, but it is clear on the face of the invoice that such uses are included. Exhibit G. Furthermore, in part based on what O'Neill charged for the uses in the 2018 invoice, *see* Exhibit H, it is clear that almost the entirety of the cost charged was for some combination of the exclusivity and the Point of Sale prints. There is no comparability between the uses allowed in Exhibit G and the infringement in this case.

Exhibit H, the 2018 license invoice, shows three different images from three different photographers licensed for publication in a French magazine where the licensing agent charged 350-1,000 Euros per image depending on

the size to be used in the magazine, the highest amount being the 1,000 Euros O'Neill charged for one of his works (not the same as the one at issue here) to be used in a full-page and a quarter-page reproduction in a widely-distributed French magazine. Exhibit H; O'Neill Decl. ¶¶ 21-22. Similar to the issues with Exhibit G, it is very hard to compare such a use with the infringement at issue here.

Again, O'Neill was given every chance to put in additional evidence to prove a lost license fee. The Order to Submit Additional Evidence noted that the uses licensed in Exhibits G and H "may be for much different uses than the use in question" and that "the most relevant evidence will be licenses showing what Claimant has charged in the past for similar social media uses of the works at issue or similar works." (Dkt. 18). Claimant not only did not put in additional licenses; he chose not to put in an additional witness statement further explaining the license invoices submitted or any others or giving the Board any more information.

With almost no evidence of O'Neill's lost license fee, the Board will rely on its wide discretion to "consider what is just in the particular case." Here, what appears to be just is an award of $1,200. An award of $1,200 is a bump up from the statutory minimum of $750, taking into account the fact that the infringement was used to directly promote a commercial service and bring income to Respondent. $1,200 is also appropriate to deter Carroll and others from using O'Neill's images without paying the appropriate license fees. Carroll clearly used the Work to market Sky Lounge's services. O'Neill is a professional photographer who licenses photographs to various publications and business entities for editorial and commercial uses, and his ability to continue to license photographs depends, in part, on the enforcement of unlicensed usage of his photos; otherwise, others will believe they can utilize O'Neill's photos for commercial purposes without paying any license fees.

Based on the record before it, the Board awards $1,200.

VI. Conclusion

The Board's proposed default determination is to find that Carroll has committed copyright infringement and to award O'Neill $1,200 in statutory damages.