Electronically Filed
Docket: 24-CCB-0049
Filing Date: 12/12/2024 02:32:35 PM EST

Claimant's Reply

Objections

To start, Claimant objects to Respondent's references to items not provided in discovery and upon which it relies in its Written Testimony (Dkt. 41) filed in this matter. Specifically, Respondent's production in response to the Board's standard request for production of documents consisted solely of the following items[1]:

- Copyright CCB Standard Requests to Produce Documents.docx (attached as Ex. A);
- JessTalk Website & YouTube Channel.pdf (attached as Ex. B);
- Michael Russell Cost of Photo & Vimeo Video Count PDF.pdf (attached as Ex. C); and,
- *Mastering the Art of Living* ("MAL") video where Respondent used the photo at issue (Dkt. 37-39).

As they were not provided in discovery, all of the videos, etc., referred to by Respondent in its Written Testimony (*see* Dkt. 41 at p. 2), with the exception of the MAL video, should not be considered by the Board. However, even if the Board chooses to accept these disputed items, they are completely irrelevant as they have nothing to do with the MAL video and the infringement claim here.

Scope of Reply

Respondent fails in its Written Testimony to argue any of its asserted defenses except for Fair Use. Therefore, Claimant assumes that it has waived those defenses; thus, in

[1] Respondent later produced two communications relating to its speaking rates.

this Reply, he only addresses the Fair Use and Damages arguments made by Respondent. If that is in error, then Claimant relies on the arguments made in Claimant's Written Testimony (Dkt. 35).

Respondent's Fair Use Argument is Legally in Error and Unsupported

Purpose and Character of the Use

Respondent repeatedly asserts that the video was "entirely personal and non-commercial." Dkt. 41 at p. 1. It further asserts that the Vimeo account was "private" and "not readily accessible to the public or prospective clients." *Id*. These statements are unsupported, at best.

Respondent does not explain why or how the Vimeo account was "not readily accessible to the public"; this is simply because it *was* readily accessible. Claimant had no issues accessing it—there was no password or subscription required[2]. However, Claimant cannot prove that beyond his testimony since Respondent deleted all of the videos posted there after this claim was filed, despite having received a clear litigation hold with the initial demand letter sent by Claimant's attorney. *See* Dkt. 34, Ex. B at pp. 4-5. This spoliation of evidence should be weighed by the Board, specifically with an adverse inference when considering this issue.

Moreover, a viewing of the MAL video shows that it is clearly self-promotional. It shows a series of events presented by Respondent. Dkt. 37-39, Ex. N. The idea that it was for private reflection and encouragement, as Respondent asserts, is not credible.

[2] Vimeo offers many levels of privacy settings (see https://help.vimeo.com/hc/en-us/articles/12426199699985-Overview-of-video-privacy-settings last accessed Dec. 12, 2024).

Respondent's bald assertions above, with conclusory statements about what would or would not attract business (*see*, Dkt. 41 at p.2) and unsupported claims about how speakers and coaches market their services (*id.* at p. 3), mean that Respondent's argument that the use was non-commercial is entirely without merit.

Respondent then turns to asserting transformativeness in its use of the photograph. *Id.* However, Respondent ignores what "transformative" means in the context of Fair Use. *Goldsmith* makes it clear:

> But the first fair use factor instead focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism. Although new expression, meaning, or message may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor.

Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258, 1262 (2023). So, while some new meaning (etc.) *may* be relevant, it isn't as simple as just saying so nor may it be enough without something more. The Court further clarified that since AWF's use and Goldsmith's purpose were essentially the same, even with the changes Warhol made to the original work, that wasn't enough to transform the meaning or message sufficiently for the factor to weigh on AWF's side.

Here, Respondent did not alter the work at all but rather used it, whole-cloth, for precisely the same purpose for which it was created: to show Vancouver; that is, in Respondent's use, to show it as the location for the workshops that followed in the video. *See* Ex. N. Pt. 1, Dkt. 39. Further, Respondent apparently found the image so compelling that it selected it to be the still image used to promote the video on the menu

page. Ex. O, Dkt. 33. In short, there is nothing transformative about Respondent's use of the photograph.

Thus, Respondent's use of Claimant's photograph was both commercial and non-transformative; this factor is in Claimant's favor.

The Nature of the Copyrighted Work

Respondent again admits that "the photograph is a creative work" (Dkt. 41 at p. 4) as it did in its Response (Dkt. 14), but then tries to make what seems to be an untimely, improper, and irrelevant *de minimis* defense argument. What matters for this factor is whether the infringed-upon work was creative; here, both parties agree that it is a creative work. Thus, this factor is in Claimant's favor.

The Amount and Substantiality of the Work Used

Respondent again tries to argue that, since it only used the photograph for 7 seconds in an hour-long video, that makes the use "de minimus" [sic]. Dkt. 41 at p. 4. As Claimant explained in his Written Testimony (Dkt. 35 at p. 5) this factor is not about whether the use was only a small part of *Respondent's* work, but rather how much of Claimant's work was used—that is, was all of it used or the heart of it or only a small part of the original work? *See McGucken v. Pub Ocean Ltd.*, 42 F.4th 1149, 1162 (9th Cir. 2022). Respondent used the entire photograph and this factor favors Claimant.

The Effect on the Market

Respondent's argument in this section is essentially about *its* market and marketing, not Claimant's. Claimant licenses his photographs to others for use. Respondent did not

license the work and, as *Monge* makes clear, if such behavior were to become widespread it would adversely affect Mr. Russell's market. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1182 (9th Cir. 2012). This final factor is also in Claimant's favor. As all four factors are on Claimant's side, the Fair Use defense fails.

Respondent's Damages Arguments are Unsupported and Without Merit

Respondent forwards completely unsupported claims and rationales regarding its actions in this matter. For example, it provides no evidence about its registered agent failing to notify it about service in this matter, including the alleged eight phone calls it made to investigate; neither does it provide any evidence for its alleged cancellation of the UPS Store as its business address or that the UPS Store's manager contacted them. *See* Dkt. 41 at pp. 6-7.

Additionally, Respondent does not explain how it did not receive any of Claimant's counsel's emails when they were sent to the same address as it has been using for this matter and that none bounced. Respondent also does not address the phone calls and voicemail left by Claimant's counsel.

Although the Board does not follow the Federal Rules of Evidence, it *does* require a party to support its claims or defenses with evidence. Here, there is none.

Instead, Respondent recites a series of implausible events whereby it never received notice about the matter prior to and even for a while after the filing of the claim here. Also, it does not explain why it didn't do even the most basic search to see if the

Copyright Claims Board was a legitimate entity ("I initially believed [the email] to be spam because had never heard of the Copyright Claims Board."). Dkt. 41 at p. 7.

Moreover, Claimant is at a loss to understand how Respondent can include in its filing "Claimant's unsupported, conclusory statements about JessTalk […]" when Claimant filed *no fewer than seven exhibits* relating to Respondent's behavior in this matter. *See,* Ex.s A-H to Claimant's Written Testimony, Dkt. 16, 23, 25, 28, 29, 30, 32, 34.

Finally, Respondent has the temerity to assert that it "recognizes the importance of respecting copyright laws" and claims that it is not cavalier about copyright (Dkt. 41 at p. 7); yet, in the September 17, 2024 CCB Status Conference, it admitted that *it did not license **any** of the music or the images* used in its video where it used Claimant's work!

In reality, Respondent is precisely the sort of entity that simply ignores the rights of others; its behavior must be addressed when assessing the damages here. Not only should the award be higher than normal, an award of attorney fees is appropriate for Respondent's bad-faith behavior.

Conclusion

For the reasons stated above as well as those in his Written Testimony previously filed, Claimant respectfully asks the Board to hold Respondent liable for the infringement of Claimant's copyright and that the Board award statutory damages in the amount of $15,000, plus attorney fees within the statutory limits.

Respectfully submitted this December 12, 2024 by:

Leslie Burns
Counsel for Claimant Michael Russell

Proof of Delivery

I hereby certify that on Thursday, December 12, 2024, I provided a true and correct copy of the Claimant's Reply to the following:

JessTalk Speaking Services, LLC, represented by Jesse Ferrell, served via ESERVICE at speak@jesstalk.com

Signed: /s/ Leslie Burns