COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0277
December 18, 2024

Catalina Maria Jaramillo	*v.*	Juliana Andrea Duque
CLAIMANT		**RESPONDENT**

PROPOSED DEFAULT DETERMINATION

Respondent Juliana Andrea Duque ("Duque") has not appeared or participated in this proceeding before the Copyright Claims Board ("Board") and the claim is now in default. If 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, Catalina Maria Jaramillo ("Claimant" or "Jaramillo"), has submitted written testimony. The Board has reviewed Jaramillo's submissions and testimony and now issues this proposed default determination. 17 U.S.C. § 1506(u)(2). For the reasons that follow, the Board finds that the evidence presented is sufficient to support a finding in favor of Jaramillo on her copyright infringement claim and awards her $1,500 in statutory damages, but finds that the evidence does not support her claim of misrepresentation under 17 U.S.C. § 512(f).

I. Procedural History

Jaramillo filed her initial claim in this proceeding on December 27, 2022, naming YouTube as a respondent. (Dkt. 1). She added Duque and Sebastian Lugo Xibille ("Xibille") as respondents in an amended claim filed on March 7, 2023 (Dkt. 3) and filed a second amended claim (the operative claim in this proceeding) against YouTube, Duque, and Xibille on May 29, 2023. Claim (Dkt. 5). The Board found the Claim compliant and, on June 21, 2023, directed Jaramillo to serve the three respondents within ninety days. (Dkt. 12).

On July 10, 2023, Jaramillo filed a proof of service form stating that YouTube had been served. (Dkt. 16). YouTube filed a valid opt-out form on August 1, 2023. (Dkt. 21). The Board dismissed YouTube from the claim on August 4, 2023. (Dkt. 24).

On July 13, 2023, Jaramillo filed a proof of service form stating that Duque had been served. (Dkt. 17). The Board sent a Second Notice to Duque by mail and email on August 3, 2023. (Dkt. 23). The Board did not receive an opt-out notice from Duque.

On August 10, 2023, Jaramillo filed an affidavit stating that the service documents had been mailed to Xibille on August 9, 2023. (Dkt. 25). The Board notified Jaramillo that service on Xibille appeared deficient and on September 14, 2023, she filed an affidavit that described unsuccessful attempts to serve Xibille on September 7 and 8, 2023. (Dkt. 26; Dkt. 27). After issuing an order to show cause on October 13, 2023 (Dkt. 27) and considering Jaramillo's response filed on October 25, 2023 (Dkt. 28), the Board dismissed the claim against Xibille for failure to serve on October 25, 2023. (Dkt. 30).

With Duque as the only respondent left, the Board issued an order on October 31, 2023 to notify the parties that the claim had entered the "active phase" of the proceeding. (Dkt. 31). The Board also ordered Jaramillo to pay the second filing fee and Duque to register for eCCB, the Board's online docketing system, by November 14, 2023. *Id.* The Board sent the order to Duque by mail and email on November 2, 2023.

On November 14, 2023, the Board issued a Scheduling Order (Dkt. 35). The Scheduling Order reminded Duque that she "must register for eCCB by December 5, 2023, and must file a response to the claim by December 14, 2023, . . . or the Board may begin the default process." *Id.* The Board sent the order to Duque by mail on November 16, 2023. Duque did not register for eCCB or submit a response. The Scheduling Order also noted the date and time of a December 21, 2023 pre-discovery conference. *Id.* Jaramillo attended the pre-discovery conference, but Duque did not.

On December 21, 2023, the Board issued its First Default Notice to Duque because she had not met any of the mandatory deadlines set by the Board. (Dkt. 38). The First Default Notice gave Duque until January 14, 2024 to file a response and register for eCCB. *Id.* On January 5, 2024, the Board issued its Second Default Notice, which reminded Duque of the January 14, 2024 deadline. (Dkt. 39). These default notices were issued on eCCB as well as mailed to Duque. Duque failed to file a response or register for eCCB. The Board held a status conference on

March 6, 2024. Jaramillo attended, but Duque did not. The Board has received no communication at all from Duque.

Accordingly, on April 2, 2024, the Board ordered Jaramillo to submit written direct testimony in support of a default determination. (Dkt. 41). Jaramillo submitted the required written materials on May 13, 15, and 17, 2024, including a Party Statement (Dkt. 73), a list of evidence, evidence (Dkt. 47-72),[1] and a Witness Statement (Dkt. 46) that is identical in content with the Party Statement. Jaramillo filed a Statement as to Damages (Dkt. 77) on September 10, 2024, seeking the maximum award of statutory damages that the Board may grant.

II. Factual History

Jaramillo is a Ph.D. candidate at the University of Edinburgh. Witness Statement ¶¶ 3, 7. In May 2018, as part of her doctoral work, she travelled from Edinburgh to Medellín and conducted an interview, on video, with Jhon Jairo Velásquez, a/k/a Popeye ("Velásquez"), who discussed his experiences with Pablo Escobar. *Id.* ¶¶ 6-11, 24. Velásquez had been a hitman for the notorious Colombian drug lord, and had "parlayed his criminal past into a popular YouTube channel, books and a movie." Elian Peltier, *Jhon Jairo Velásquez, 57, Dies; Escobar Henchman Turned YouTube Star*, New York Times (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/world/americas/Jhon-Velasquez-dead.html ("New York Times Article").

Jaramillo wrote the interview questions based on five years of academic research. Witness Statement ¶ 9. She had the interview filmed for purposes of her Ph.D. thesis. *Id.* ¶¶ 6-7, 11 (first),[2] 12. Jaramillo agreed to let Velásquez select the videographer to avoid safety concerns, and he selected Xibille. *Id.* ¶¶ 11 (first), 12. Jaramillo states that Xibille "never had any copyright over the material," and she "never gave him permission to publish, edit, or manipulate my work." *Id.* Xibille recorded the interview and sent Jaramillo the video footage via WhatsApp on May 14, 2018, then edited a video of the interview based on her instructions and sent her that full work on a CD. *Id.*; Exhibits 3, 4, and 4 Translation (Dkt. 52, 51, 47).

[1] Jaramillo labelled each of the exhibits that she filed as "Evidence" followed by a number (*e.g.,* Evidence 1, Evidence 2, etc.). In this determination, the Board uses the more traditional label of "Exhibit."
[2] The Witness Statement uses some of its paragraph numbers twice. In such cases, references to "first" are to the first paragraph with the cited number and references to "second" are to the second paragraph with that number.

Jaramillo claims sole ownership of the copyright in the interview and all related material. Witness Statement ¶¶ 5-6. The U.S. Copyright Office registered her copyright in the "production as a motion picture" of the interview (the "Work"), titled "Popeye's Interview." *Id.*; Registration No. PAu 4-086-477 (Dkt. 50). The certificate, for an unpublished work, names Jaramillo as the copyright claimant and as the author, describing her authorship as "production, direction, script/screenplay, this was my work for my PhD thesis." *Id.* Copyright Office records include two video files that Jaramillo submitted as deposit material during the registration process, totaling just under 56 minutes, that make up "Popeye's Interview." Excerpts of the Work submitted as evidence show Jaramillo holding papers from which she read questions to Velásquez, who was seated next to her. Exhibits 2, 7, 9, and 10 (Dkt. 68, 48, 67, 70); Witness Statement ¶¶ 11 (second), 22, 24 (first).

Velásquez died in 2020. Witness Statement ¶ 42; New York Times Article. On January 11, 2021, allegedly infringing videos were published and distributed on two YouTube channels, Nextark Cinema or NTK Cinema ("NTK") and Popeye Arrepentido. Witness Statement ¶ 20. The version of the video on the NTK channel, titled "Popeye Entrevista Inedita Nunca Publicada" ("Popeye Never-Published Interview") was seven minutes and nineteen seconds long. Exhibit 6 (Dkt. 66). Another allegedly infringing video, eighty-one seconds long, titled "Entrevista Nunca Vista De Popeye Nuevos Temas" ("Popeye Never-Published Interview New Topics") was published on the Popeye Arrepentido channel on March 15, 2021. Exhibit 19 (Dkt. 71); Witness Statement ¶ 36.[3] The two videos are referred to herein collectively as "Popeye Never Published Interview." Exhibit 19 appears to include approximately the first minute and five seconds of audiovisual content and an additional seven seconds of audio content from Exhibit 6 and appears to be a teaser for Exhibit 6 or another longer version of the video; a message appears on screen at the end stating "Ver completa en el link- canal aliado" (roughly, "see the full version at the link – partner channel").

The "Popeye Never Published Interview" is a composite that Jaramillo calls a "photomontage of my work," stitching together footage from the Work with new footage in which Duque "imitated" Jaramillo. Witness

[3] In her testimony at the cited paragraph, Jaramillo refers to this video as "El Cine y Series que Veia Pablo Escobar" (or "The Movies and Series that Pablo Escobar Watched"), but she cites to Exhibit 19, which bears the title "Entrevista Nunca Vista De Popeye Nuevos Temas."

Statement ¶ 22. The composite videos included Velásquez's image and his responses from the Work, as well as short clips from motion pictures referred to by Velásquez in the interview, but they removed Jaramillo (and her voice) and replaced her with Duque, asking questions based on Jaramillo's questions in the Work— creating the illusion that Duque was seated next to Velásquez, interviewing him, and eliciting the responses that he in fact give Jaramillo in the Work. *Id.* ¶¶ 22-26; Exhibits 2, 6, 7, 9, 10, and 19 (Dkt. 68, 66, 48, 67, 70, 71).[4]

Jaramillo contends that Duque and Xibille personally published at least thirteen infringing videos on the Popeye Arrepentido and NTK YouTube channels. Witness Statement ¶ 37. However, she does not present evidence supporting that contention. The evidence she has submitted shows that Duque posted one of the composite videos, seven minutes and fifty-one seconds long (Exhibit 12 (Dkt. 72)),[5] on Instagram on or before March 15, 2021, and also posted one of the composite videos (Exhibit 13 (Dkt. 65))[6] on Facebook on January 25, 2021. Witness Statement ¶¶ 25 (second), 31. Jaramillo sent a takedown notice to Instagram, and the video was removed. Duque acknowledged the removal to Jaramillo and threatened to repost it elsewhere if Jaramillo did not leave her in peace. *Id.* ¶ 31; Exhibits 15, 16, and 16 Translate (Dkt. 59, 63, 56).

According to the Claim, Jaramillo sent takedown notices to YouTube seeking removal of videos from the Popeye Arrepentido channel on February 13 and March 16, 2021, and from the NTK channel on December 10, 2022. Claim. The Claim also alleges that YouTube received counter-notices on May 2, 2021, May 20, 2021, and December 26, 2022. *Id.* It asserts that Duque and Xibille "give fake statement[s] in counter notification[s] to YouTube with fake names and emails to rob my interview," and that they "sen[t] a counter notification pretending to be [Velásquez's son] Sebastian Velásquez with a fake email." *Id.*; *see* Witness Statement ¶ 37 ("They have constantly given false YouTube statements to send counternotifications, providing fake addresses."). However, no

[4] Jaramillo submitted an exhibit with a still image from the Work and a corresponding image from "Popeye Never Published Interview." Exhibit 7 (Dkt. 48). A copy is appended to this determination.
[5] Exhibit 12 is an eleven-second video of a laptop computer on which an Instagram post by Duque, apparently posted on "January 29," plays a video with footage identical to footage at the beginning of Exhibit 6. While Exhibit 12 is only eleven seconds in length, it is clear from the image of the posted video that its entire length is seven minutes and fifty-one seconds.
[6] Exhibit 13 is a screenshot of a Facebook post by Duque dated "25 Jan" that includes one of the "Popeye Never Published Interview" videos on YouTube.

documents filed as evidence support the contention that Duque had any involvement in submitting counter-notices to keep infringing material online.

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). Jaramillo submitted Certificate of Registration No. PAu 4-086-477 for the Work, which was effective as of May 4, 2021. 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 MidlevelU, Inc. v. ACI Information Group*, 989 F.3d 1205, 1257 (11th Cir. 2021) ("A copyright registration is prima facie evidence of the validity of the copyright and the facts stated in the certificate.") (internal quotation marks and citations omitted). This evidentiary presumption applies when the certificate of a registration is obtained before or within five years after first publication of the work. 17 U.S.C. § 410(c). As the Work was not published at the time of registration, the evidentiary presumption applies, and the Board need only consider whether Duque infringed the Work.

Jaramillo has established that the "Popeye Never Published Interview" videos, in which Duque appeared, incorporated substantial portions of the audiovisual content of the Work. The material that was incorporated constituted original expression protected by copyright. The Board has no difficulty concluding that the "Popeye Never Published Interview" videos infringe the copyright in the Work. The question that remains is whether *Duque* is liable for the infringement.

Although Jaramillo alleges that Xibille and Duque published more than thirteen videos on YouTube, the only evidence she provides that Duque was involved in dissemination of any infringing videos is the evidence that Duque posted Exhibit 12 on Instagram on or before March 15, 2021 and posted Exhibit 13 on Facebook on January 25, 2021. Witness Statement ¶ 25 (second); Exhibits 12, 13.[7]

[7] It is unclear whether Exhibit 13 was actually uploaded by Duque, or whether Duque simply embedded the YouTube video on her Facebook post. We need not decide any issues related to liability for embedding because Exhibit 12 appears to be a post involving the uploading of the video, and for purposes of calculating statutory damages, it is immaterial whether Duque made one infringing post (Exhibit 12) or two (Exhibits 12 and 13).

Unless it falls within the scope of an applicable defense, uploading a video to a social media site without the permission of the copyright owner violates the copyright owner's exclusive right to reproduce the copyrighted work in copies, 17 U.S.C. § 106(1), and streaming it to people who view it on the internet violates the exclusive right to perform the copyrighted work publicly. 17 U.S.C. § 106(4). Because Jaramillo has proved that Duque uploaded at least one infringing video for streaming on a social media platform, the Board concludes that subject to any applicable defenses, Duque is liable for infringing the copyright in the Work.

IV. Misrepresentation

In addition to the copyright infringement claim, Jaramillo asserts a misrepresentation claim against Duque under 17 U.S.C. § 512(f). Section 512(f) provides that a person who knowingly makes a misrepresentation to an online service provider ("OSP"), either in (1) a takedown notice demanding that the OSP remove or disable access to allegedly infringing material or (2) a counter-notice (responding to the takedown notice) demanding that the OSP restore access to the material that had been taken down, can be held liable for damages if the OSP complied with the demand in reliance on the misrepresentation.

The Claim identifies Sebastian Lugo [Xibille] and Mateo Velasquez (Juliana Duque) in response to the question, "Who sent the counter notice(s)?" It adds that "Juliana and Sebastian send a counter notification pretending to be Sebastian Velasquez with a fake email" and that "Sebastian and Juliana have been notified few times but they keep give fake statement in counter notification to YouTube with fake emails and names to rob my interview." It adds that counter-notices were sent on May 2, 2021, May 20, 2021, and December 26, 2022, and that "the information of the counter notification constantly changed." However, in her written testimony, Jaramillo provides no evidence to back up those allegations apart from her unsupported assertion that Xibille and Duque "have constantly given false YouTube statements to send counter notifications, providing fake addresses." Witness Statement ¶ 37.

Having failed to present any evidence that Duque was involved in sending any counter notices to YouTube or any OSP, Jaramillo has not begun to meet her burden of proof that Duque made an actionable misrepresentation under

section 512(f). Accordingly, Jaramillo's misrepresentation claim shall be dismissed without prejudice.[8]

V. 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 and finds that no such defense to the infringement claim exists in this proceeding.

VI. Damages

Jaramillo has elected statutory damages, requesting "the maximum the board can gran[t]." Statement as to Damages (Dkt. 77). Before the Board, the maximum award of statutory damages that can be awarded is $15,000 per work for works timely registered (either before the infringement started or within three months of first publication of the infringed work) and $7,500 for works not timely registered. 17 U.S.C. § 1504(e)(1)(A)(ii). The effective date of Jaramillo's copyright registration for her unpublished work was May 4, 2021, after Duque's infringement commenced. Therefore, the maximum statutory award is $7,500 for the single work that has been infringed. *Id.* The minimum statutory award is $750. See 17 U.S.C. § 504(c)(1).

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); *Broadcast Music, Inc. v. Evie's Tavern Ellenton, Inc.,* 772 F.3d 1254, 1260 (11th Cir. 2014). "[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).

[8] Dismissals in default cases are without prejudice because the applicable regulation provides: "If the Board determines that the evidence is insufficient to support a finding in favor of the claimant or counterclaimant, the Board shall prepare a proposed determination dismissing the proceeding without prejudice and shall provide written notice of such proposed determination to the claimant or counterclaimant." 37 C.F.R. § 227.3(a)(2).

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); *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 862 (S.D.N.Y. 1984) ("Undoubtedly assessed statutory damages should bear some relation to actual damages suffered."); *Clever Covers v. Southwest Fla. Storm Def., LLC,* 554 F. Supp. 2d 1303, 1313 (M.D. Fla. 2007); *Seoul Broad. Sys. Int'l v. Young Min Ro,* No. 9-cv-433, 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. 19-cv-1066, 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") (citations omitted).

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 prove actual damages, the plaintiff must "demonstrate a 'causal connection' between the defendant's infringement and an injury to the market value of the plaintiff's copyrighted work at the time of infringement." *Montgomery v. Noga,* 168 F.3d 1282, 1294 (11th Cir. 1999). To secure actual damages, a claimant typically shows "lost sales, lost opportunities to license, or diminution in the value of the copyright." *Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1276 (M.D. Fla. 2008). 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).

Jaramillo has presented no evidence of monetary losses she has suffered due to Duque's infringement. Not surprisingly in light of the fact that Jaramillo prepared *Popeye's Interview* as part of her work pursuing a Ph.D. and not as a work to be disseminated for profit, she can show no lost profits she would have gained if Duque had not infringed her work, and she has not come forward with probative evidence of what a reasonable license fee Duque would have been expected to pay for her use of Jaramillo's work might be. Allegations she makes (but does not prove) about the

number of viewers and followers of other YouTube channels and videos and the money made by other videos, *see* Witness Statement ¶¶ 40-43, are not probative of any monetary harm suffered by Jaramillo due to the one or two acts of infringement by Duque shown in this proceeding.

However, while it is the Board's usual practice to award statutory damages in an amount that bears a relationship to actual damages, the Board is also guided by what "is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like." *L.A. Westermann Co.,* 249 U.S. at 106. In this particular case, the copyright owner's complaint is not that the infringer reaped the profits that the copyright owner was entitled (and wished) to sow. Rather, it is that the infringer usurped the copyright owner's right to determine whether, and if so when and where, to publish the copyright owner's work.

As the Supreme Court proclaimed in *Harper & Row, Publishers v. Nation Enterprises,* 471 U.S. 539, 553 (1985): "The right of first publication implicates a threshold decision by the author whether and in what form to release his work." The Court noted that only one person can be the first publisher of a work, making first publication "inherently different from other § 106 rights." *Id.* It observed that just as the First Amendment guarantees not only freedom of speech but also the "right to refrain from speaking at all," the same is true of copyright. "[C]opyright, and the right of first publication in particular, serve this countervailing First Amendment value." *Id.* at 559-60. In making available a derivative work consisting primarily of excerpts from Jaramillo's unpublished video, Duque usurped Jaramillo's right of first publication. Jaramillo had no apparent interest in releasing the video of the interview to the public, but her copyright does not depend on her own willingness to publish the work. To require Jaramillo, in order to receive an award beyond minimum statutory damages, to show the value of a license to use her work, or show the amount of the profits that she lost due to Duque's infringing publication, is to misapprehend the value of a copyright in a work that is not intended for publication. As Jaramillo testified, the interview was intended to be part of her Ph.D. at the University of Edinburgh and was confidential. Witness Statement ¶¶ 6-7, 27 (first), 26 (second), 32-33.

The Board has no doubt that the "wide discretion" given to a court to apply its "sense of justice" in "considering the nature of the copyright, the circumstances of the infringement and the like" when awarding statutory damages, *L.A. Westermann,* 249 U.S. at 106, gives the Board some leeway in arriving at the appropriate award. The Board

therefore awards Jaramillo $1,500 in statutory damages, two times the statutory minimum, for Duque's infringement of her copyright.

VII. Conclusion

The Board finds Respondent Juliana Duque liable for infringement and awards Claimant Catarina Jaramillo $1,500 in statutory damages. The claim for misrepresentation is dismissed without prejudice.

Copyright Claims Board

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The video is obvious that it is a photomontage if you compare my video with the video, tiles were erased, you can see that they even erase for mistake Popeye runners. Please look at image 1 and image 2. She also is bigger than him, when she should be smaller, please look at the leg of the chair. The angle of her is not right with the perspective. Why does he not look at her? You can see that in the real video, I have a contact with him, but it is not the same with their video.



Image 1. My video de real video



Image 2. The fake video, which has been published on YouTube illegally.