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IN THE COPYRIGHT CLAIMS BOARD OF THE COPYRIGHT OFFICE

Docket No. 24-CCB-0005

Case Name: Kimberly Mullin v. Katherine Velasco

Document: REQUEST TO EXCLUDE EVIDENCE AND DENY MOTION TO AMEND PROCEEDINGS

INTRODUCTION

Respondent Katherine Velasco requests the Copyright Claims Board (CCB) exclude as evidence all exhibits used by Claimant Kimberly Mullin in support of her reply testimony (Mullin Exhibits 5-12) on the grounds that (1) the new evidence was not presented in discovery, (2) Claimant has not demonstrated good cause for including it, and (3) rather than rebutting or refuting Respondent's written testimony, the new evidence is presented to overcome deficiencies in Claimant's burden of persuasion. Respondent further requests that the CCB deny Claimant's motion to amend the pleadings to include the original copyright owner, Kimberlin Photography LLC (Kimberlin), on the grounds that such an amendment is untimely and prejudicial to Respondent.

BACKGROUND

Claimant Kimberly Mullin filed her claim for copyright infringement in this case on January 10, 2024. In her claim, Claimant asserted her ownership of the copyrights at issue, the copyrights in a series of photographs of a residential property located at 1 Lake Louise Dr. # 28, Bellingham, Washington 98229. *See* Case Doc. 1 ("Claimant captured a number of photographs .

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. . and licensed them to a third party . . . . Respondent Velasco posted a total of 24 images *owned by Claimant*." (emphasis added)). Claimant had previously asserted her ownership of the copyrights in correspondence with Respondent Katherine Velasco. *See* Case Doc 17, pp.2-3 (referring to PDF pages).

At least as early as December 5, 2023, Respondent requested proof that Claimant did in fact own the copyrights in the photos. Case Doc 17, pp.2-3 ("If you are, in fact, the photographer please provide proof and let me know how much you would like for them, so they can be used."). Respondent again noted that no such proof had been presented in her claim response of May 15, 2024.[1]

In her May 15, 2024, claim response, Respondent also presented evidence of the fair market value of a real-estate photography session in the Bellingham, Washington area.

Per the July 5, 2024, amended scheduling order, discovery responses were due on August 16, 2024, and the discovery status conference was scheduled for August 27, 2024. At the conference, the CCB closed the discovery period except to the extent that Respondent could get ahold of her correspondence with Claimant through her closed listing accounts (correspondence that Claimant already had access to). With the exception of that correspondence, the parties each represented through counsel at the status conference that they had nothing else to disclose in discovery. At that time, Claimant had failed to disclose any evidence (1) proving her ownership in the copyrights in the photographs, (2) contradicting Respondent's evidence of fair market

[1] Claimant submitted a Google Drive location containing at least some of the photographs prior to the filing of this case, but as discussed in Respondent's written testimony, the Drive location only proves that Claimant had access to the photos, not that she owned the copyrights therein.

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value for real-estate photography, or (3) showing her own rates for either a real-estate photography session or relicensing of previously captured photos.

On October 11, 2024, Claimant submitted her first non-testimonial evidence of copyright ownership in support of her written testimony: the registration number for the copyright in photos of 1 Lake Louise Dr #28. Respondent's attorney had previously searched in both Westlaw's U.S. Copyright Database and the United States' Official Copyright Catalogue for any copyrights owned or authored by Kimberly Mullin and had been unable to find any. Upon receipt of the Registration Number, VA0002381069, it became apparent why. The listed owner and author of the photographs was not Claimant as she had asserted. Instead, the author and owner was Kimberlin Photography LLC—a non-party entity *never before presented as a copyright owner* until Claimant's written testimony. Claimant thus provided proof that she did not, in fact, own the copyrights at issue, in direct contradiction to her claim, her subsequent filings, and her previous correspondence with Respondent.

In her written testimony, Claimant did not disclose any non-testimonial evidence showing the fair market value of real-estate photography.

In short, Claimant had failed to prove her prima facie case by failing to show she had ownership of a valid copyright. *See A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) ("Plaintiffs must satisfy two requirements to present a prima facie case of direct infringement: (1) *they must show ownership of the allegedly infringed material* and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106." (emphasis added)). Claimant also failed to provide any support for her assertions of reasonable damages aside from her own testimony as to her prior rates. *See Michelle Shocked v. Gavin McInnes*, 22-CCB-0263 (Feb. 8, 2024) (finding that evidence of

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actual damages presented exclusively by party testimony amounted to "no evidence tending to show actual damages").

Claimant now attempts to remedy these defects by improperly introducing new evidence. Claimant presented this new evidence for the first time on December 23, 2024, with the filing of her reply testimony. Claimant further moves to amend the pleadings *at the end of this case* to include Kimberlin as a Claimant, presumably in case ownership by Claimant is not established by the improperly filed evidence.

ARGUMENT

When presenting written reply testimony in a CCB proceeding, the evidence presented "shall only include documents that were served on opposing parties pursuant to the scheduling order, absent leave from the Board, which shall be granted only for good cause." 37 CFR 222.15(b)(1)(ii) (incorporated into reply testimony by 37 CFR 222.15(c)). *Accord Presenting Your Case*, CCB Handbook 5 (Jan. 2, 2024) ("You can only include, however, evidence that you provided to the other party or that the other party provided to you during discovery or as part of a claim, counterclaim, or response. In limited circumstances, the CCB may give you permission to include evidence that has not already been provided to all parties, but only if there is a good reason to do so."); *see also id.*, at 8 (applying the previous quotation to reply testimony).

Additionally, reply evidence "must be limited to documentary evidence required to contradict or rebut specific evidence that was presented in an opposing party's written response testimony..." 37 CFR 222.15(c)(1).

Claimant presented the new Exhibits 5-12 (Case Docs. 23-24 & 26-31) to Respondent's counsel for the first time in her written reply testimony (Case Doc. 25). Therein, Claimant provided no excuse or explanation as to why such evidence was excluded from her discovery

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Portland, OR 97201
503.227.5631
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disclosures during the discovery period nor any showing as to why good cause exists to allow introduction of this new evidence. Claimant would have had access to each and every one of these documents prior to the discovery deadline.

Claimant complains that Respondent "now for the first time" brings up the issues of ownership and fair market value for Claimant's services. On the contrary, Respondent's claim response addressed the issue of ownership as far back as May 15, 2024, in the CCB proceedings. Respondent raised the issue of ownership at least as early as December 5, 2023, before the proceedings were even brought before the CCB. Respondent also raised the issue of reasonable rates in the claim response and in its settlement offer to Claimant, dated May 6, 2024. Case Doc. 19, ex.2 (pp.30).

At the pre-discovery conference of May 21, 2024, the CCB informed the parties that all allegations would need to be proven, including ownership of the copyrights, and that statutory damages would likely be tied to actual damages, thus evidence of actual damages should be submitted. The CCB strongly suggested the parties review previous damages awards to see the kind of evidence the CCB considers. Even a cursory review of those opinions suggests that something more than testimony is necessary. Accordingly, Claimant has failed to show good cause why new evidence should be permitted.

Even had Claimant shown good cause, most of the evidence presented is not offered to rebut or refute Respondent's arguments. Perhaps realizing that her burden of persuasion regarding ownership and reasonable value for services was not likely to be met by uncorroborated testimony alone, Claimant now ambushes Respondent with new evidence intended to flesh out the basic elements of copyright infringement and remedy her lack of basis for a reasonable damages award.

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Claimant attempts to draw attention away from its ambush with manufactured outrage over Respondent's "bad-faith" arguments. In support of this position Claimant raises four arguments. First, Claimant argues that the CCB found that the claim was compliant with the statutory and regulatory requirements for bringing a claim. Yet, compliance with these requirements merely amounts to submitting a completed form. It does not determine that any issues on the merits have been disposed of. The Notice of Compliance explicitly states,

> Finding the claim compliant means that it can move forward. *It does not mean that the CCB agrees with any of the statements you have made or answers you have given in your claim*, including but not limited to whether you have checked the correct boxes for the rights that were allegedly infringed or whether or not any respondent is an online service provider. *It also does not indicate how the CCB will rule on your claim or what damages, if any, the CCB has the power to award or will award if your claim succeeds.*

Notice of Compliance (Jan. 12, 2024) (emphasis added). In other words, Claimant has met its burden of basic production. It has not, merely by passing the compliance check, persuaded the CCB that Claimant is in fact the owner of the copyrights.

Claimant's second argument is that Respondent's argument is tantamount to an untimely motion to dismiss and further relies on the assumption that copyright ownership was settled by the CCB's issuance of the Notice of Compliance. Respondent appears to believe one of two unfounded scenarios. In the first scenario, the CCB (1) independently verified and disposed of the issue of ownership, (2) found no issue with the true owner of the copyrights being a non-party to this case, and (3) allowed Claimant to proceed despite not owning the copyrights. In the second, Respondent was obligated to raise the ownership question in a non-existent motion to dismiss procedure and has waived her opportunity to raise an ownership argument now, despite having raised it in her claim response and having the CCB explicitly inform the parties in a conference that ownership will need to be proven. *See* Case Doc. 25, at 8 & fn.6. Even if the

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Portland, OR 97201
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CCB had a motion to dismiss procedure, Claimant did provide testimony as to her ownership of the copyrights. Taken as true, as is usually the case in motions to dismiss, such testimony of ownership would be enough to overcome the burden of production and would allow the case to proceed. But meeting the burden of production at the outset of a case does not absolve the Claimant from its requirement to later meet the burden of persuasion on ownership, especially when contradicting evidence is presented.

Third, Claimant points to her post-hoc receipt of copyright ownership, memorialized in a transfer memorandum signed December 22, 2024, more than a year after Kimberlin applied for registration and over 4 months after discovery was due. The transfer memorandum was clearly created in response to Respondent's arguments regarding ownership in another attempt to correct an ownership deficiency at the eleventh hour, now that Respondent's opportunity to respond to this evidence has already been exhausted.

Fourth, Claimant now moves the CCB to join Kimberlin, newly the previous owner of the copyrights by amending the pleadings, again at the end of the case, to rectify a deficiency it should have anticipated long before. Claimant argues that Respondent will not be prejudiced by the addition of the parties because Kimberlin is a single-member LLC owned by Claimant and has therefore been here constructively the whole time. But that is clearly not the case; Respondent already has been prejudiced by the lack of transparency about ownership. Respondent was unaware of the true owner of the copyright *and thereby prevented from conducting a reasonable investigation of the case* prior to the close of discovery. Further, Claimant failed to disclose this information until after the investigative phase was over and now attempts to present its full case in chief, including alternative arguments, for the first time, in its written reply testimony. Instead of filing a diligently considered and prepared claim in the

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Portland, OR 97201
503.227.5631
Chernofflaw.com

beginning, or amending the pleadings upon realization of her deficiencies, Claimant now attempts to substitute Kimberlin at the end of this case without Respondent having opportunity to consider, research, investigate, or prepare defenses or counterclaims against Kimberlin.

Finally, Claimant makes further baseless assertions that Respondent spoliated evidence, the destruction of which would be pointless given that that Respondent knew Claimant already had access to it, and lied to the CCB in her written testimony. Claimant submits these severe allegations *without any supporting documentary or testimonial evidence* of such misconduct.

CONCLUSION

Having failed to meet her burden of persuasion as to ownership of the copyrights or value of services, Claimant now summons a battery of improper cures to these defects, including a retroactive assignment of the right to sue, joining Kimberlin as the original owner of the copyrights at the eleventh hour of the case, and improperly ambushing Respondent with evidence that should have been disclosed months prior. Claimant has, until now, misled Respondent and the CCB as to ownership of the copyrights and, in doing so, attempted to violate Respondent's right to due process by preventing Respondent from investigating this case or responding to claims by the newly unveiled secret party to the case, Kimberlin Photography LLC. Claimant wishes to further circumvent fair proceedings by ambushing Respondent with evidence newly presented in violation of CCB procedures and regulations, thereby depriving Respondent an opportunity to respond to the evidence Claimant now presents. Yet in its unsigned reply, Claimant accuses *Respondent* of bad-faith conduct *merely because Respondent pointed out the deficiencies in the merits of Claimant's arguments*.

The CCB should therefore exclude and refuse to consider the exhibits 5-12 presented in Claimant's reply testimony and those arguments in the reply testimony supported by such

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evidence. The CCB should furthermore refuse to join Kimberlin Photography LLC to the case to remedy the ownership/standing issue that Claimant should have resolved from the beginning of this case.

Respondent so requests,

DATE: December 31, 2024.

s/Stuart Leijon

Stuart Leijon, WSBA 59551
Chernoff Vilhauer LLP
111 SW Columbia St.,
Suite 725
Portland, OR 97201
503.227.5631
sleijon@chernofflaw.com

Proof of Delivery

I hereby certify that on Tuesday, December 31, 2024, I provided a true and correct copy of the REQUEST TO EXCLUDE EVIDENCE AND DENY MOTION TO AMEND PROCEEDINGS to the following:

Kimberly Mullin, represented by Timothy J Billick, served via ESERVICE at tim@tbillicklaw.com

Signed: /s/ Stuart Leijon