COPYRIGHT CLAIMS BOARD

Docket number: 24-CCB-0065
February 7, 2025

Helen Walters, Ms	*v.*	365 GAT LLC
CLAIMANT		**RESPONDENT**

PROPOSED DEFAULT DETERMINATION

Respondent, 365 GAT LLC ("365 GAT" 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, Helen Walters ("Walters" 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 Walters and awards $5,000 in statutory damages. **Any determination against 365 GAT, including a monetary award for damages, will be enforceable in a court of law.**

I. Procedural History

This claim was initially filed on February 28, 2024. (Dkt. 1). Walters filed the operative Amended Claim on March 19, 2024. Claim (Dkt. 5). The Board found the Claim compliant and, on March 28, 2024, directed Walters to serve 365 GAT within ninety days. (Dkt. 9). Walters was unable to serve 365 GAT's registered agent listed with the Delaware Division of Corporations despite due diligence, and she therefore used Delaware Code Annotated § 18-105(b), which allowed her to serve 365 GAT through the Delaware Secretary of State after showing the proper due diligence. The Board accepted Walters' filings (Dkt. 10-11) and extended the opt-out period for 365 GAT. (Dkt. 12). The Board sent a Second Notice to 365 GAT by mail and email (both of which bounced back) on July 23, 2024, and also sent it by mail to the Delaware Secretary of State. (Dkt. 13). The Board did not receive an opt-out form from 365 GAT.

On August 7, 2024, the Board notified the parties that the proceeding had entered the "active phase" because 365 GAT did not submit a timely opt out, and it ordered Walters to pay the second filing fee and 365 GAT to register for the Board's online docketing system (eCCB). (Dkt. 14). The Board issued that order through eCCB and also mailed it to 365 GAT (and emailed it although the email bounced back as undeliverable). Walters paid the second filing fee on August 9, 2024. (Dkt. 15). On August 22, 2024, the Board issued a Second Notice for 365 GAT to register for eCCB (Dkt. 17) and a Scheduling Order. (Dkt. 16). In the Scheduling Order, 365 GAT was ordered to submit a response by September 23, 2024, but 365 GAT did not. Both parties were also ordered to attend a pre-discovery conference to be held on October 1, 2024. While Walters attended the October 1 conference, 365 GAT did not.

On October 2, 2024, the Board issued its First Default Notice because 365 GAT did not meet any of the mandatory deadlines set by the Board. (Dkt. 18). The First Default Notice gave 365 GAT another thirty days to file a response. *Id.* On October 17, 2024, the Board issued its Second Default Notice, which reminded 365 GAT of the November 1, 2024 deadline to cure the missed obligations. (Dkt. 19). These notices were issued through mail, email, and eCCB.

365 GAT failed to file a response or register for eCCB by November 1, 2024. Furthermore, the Board has received no communications from 365 GAT in this proceeding. Accordingly, on November 21, 2024, the Board ordered Walters to submit written direct testimony in support of a default determination. (Dkt. 20).

Walters submitted the required written materials on January 4, 2025, consisting of a party statement (Dkt. 21), her own witness statement (Dkt. 22), an evidence list (Dkt. 23-25), and evidence (Dkt. 26-84). This case is now ripe for a proposed default determination.

II. Factual History

Helen Walters is the Director of Shmuncki, a greeting cards company in the United Kingdom. Declaration of Helen Walters ("Walters Decl.") ¶ 4 (Dkt. 22). Walters creates poems, which she sells on various products through Shmuncki, and she retains the copyrights to the poems. *Id.* ¶¶ 3-6. In 2016, she created a poem titled "You held me close" (the "Work"). *Id.* ¶¶ 5-6. On January 24, 2017, she first offered the Work for sale on a print on Etsy.

Id.; Exhibit A (Dkt. 29). She has additionally sold almost identical versions of the Work on greeting cards, prints, and other products since that time on Etsy and other websites. Walters Decl. ¶¶ 9-10; Exhibit D, E, F, G, H, BC, BD, BE, BF (Dkt. 26, 28, 35, 34, 32, 82, 79, 81, 80). Walters registered a copyright in the Work, securing copyright Reg. No. TX 9-360-328 in the United States, with an effective date of January 26, 2024. Exhibit AJ (Dkt. 61); Walters Decl. ¶ 52.

Walters states that, on March 14, 2023, she discovered an almost identical copy of the Work reproduced on a desktop plaque on the website 365canvas.com. Walters Decl. ¶ 13. Walters states that she investigated and found other uses of her works on the same website. Walters Decl. ¶ 15; Exhibit AS (Dkt. 70).[1]

Walters reached out to 365canvas.com and then wrote a cease-and-desist letter. Walters Decl. ¶ 16; Exhibit AA (Dkt. 53). Walters then discussed the alleged infringements with someone named "Josie" through the 365canvas chat function. Walters Decl. ¶ 17; Exhibit AL, AM, AN, AO (Dkt. 62, 65, 66, 63). Unable to reach a resolution, Walters went through Amazon Web Services' and Google's takedown process to get the pages selling the alleged infringements removed. Walters Decl. ¶¶ 19-22; Exhibit AB, AC, AD, AE, AF (Dkt. 55, 52, 54, 56, 59). A representative from 365canvas then contacted Walters to confirm removal and apologize for their late response. Walters Decl. ¶ 23; Exhibit Z (Dkt. 47). However, on February 28, 2024, Walters noticed a shortened version of the Work on a canvas print for sale on 365canvas.com, and also states that 365canvas.com gave customers the ability to replace the family member that is the subject of the poem. Walters Decl. ¶¶ 25-40; Exhibit U, V (Dkt. 51, 50). Again, Walters had Amazon Web Services remove the listings. Walters Decl. ¶ 33; Exhibit AG, AH (Dkt. 60, 57).

Walters did internet research to discover that the 365canvas.com website was owned by 365 GAT. Walters Decl. ¶¶ 34, 56-59; Exhibit AY, AZ (Dkt. 73, 74). Walters notes that 365 GAT was not an entity and was not selling products (whether with her Work or otherwise) until 2019, which is two years after she created the Work. Walters Decl. ¶¶ 54, 73. Walters has never given permission to 365 GAT to use her Work in any form. *Id.* ¶ 46.

[1] Walters states that she has also noticed 365 GAT infringing additional poems of hers, but that is not part of this proceeding. Walters Decl. ¶¶ 61-65.

Walters licenses the Work for a fee based on usage, duration, and the licensee itself. Walters Decl. ¶ 11. She submits an example of a license into which she has entered with the licensee name redacted and without the signed signature page. *Id.* ¶¶ 11-12*;* Exhibit AK (Dkt. 64). On March 30, 2023, she charged a company £1,500 (which she says converts to $2,008, but a review of the historic pound to dollar conversion rates shows £1,500 was approximately $1,850 at that time) for a one-year license to put the Work on inserts for the sale of jewelry. Walters Decl. ¶ 12; Exhibit AK. Walters states that based on the size of canvas prints offered, 365 GAT typically sells products containing the alleged infringements for prices ranging from $20.13 to $269.41. Walters Decl. ¶ 31.

Walters is seeking $5,000 in statutory damages, which is the maximum that the Board can award due to Walters' election, when she filed her claim, that this be a "smaller claims" proceeding. Party Statement ¶ 51; Claim; 17 U.S.C. § 1506(z).

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). Walters submitted a Certificate of Registration for 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); *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)). Because Walters' United States registration was issued more than five years after first publication of the Work, it is not considered "timely obtained" and subject to the Section 410 presumptions. However, neither the copyrightability of the Work nor the ownership of the Work is in question, and evidence has been provided supporting the copyrightability and ownership of the clearly creative poetic expression in the Work.

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*, 853 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*, 853 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)).

The Board concludes that, without Walter's consent, 365 GAT reproduced, publicly displayed, and offered for sale copies of her Work. There is no question that in each instance the original and infringing poem are practically identical, and thus both strikingly and substantially similar.

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.

V. Damages

Walters elects statutory damages and asks for $5,000, which is the maximum the Board can award in a "smaller claims" proceeding. Party Statement ¶ 71; 17 U.S.C. § 1506(z).

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.") (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 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, 163 (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, with three times actual damages being most prevalent. *See, e.g.*, *Barcroft Media, Ltd. v. Coed Media Group, LLC,* 297 F. Supp. 3d 339, 359 (S.D.N.Y. 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).

Walters has provided the Board a license agreement in an attempt to establish her lost license fee in this proceeding. Walters Decl. ¶¶ 11-12; Exhibit AK. The license was for the placement of the Work on inserts to be used with pieces of jewelry to be sold by the licensee. The licensee was charged £1,500 (approximately $1,850 at the time of the license) for a one-year license. While the infringement was placed on items such as plaques and canvas prints, as opposed to jewelry box inserts, both are for the very Work at issue here and for the placement of the Work on a product to be sold. Therefore, this is the type of apples-to-apples comparison that is useful to the Board

in determining actual damages.[2]

It is unclear exactly how long the Respondent has been infringing the Work, but that is not material to the Board's determination in this "smaller claims" proceeding. Even if Respondent has only been infringing for the past year, the lost license fee for just a one-year license is enough to get Walters to the amount she is requesting. A one-year license would be approximately $1,850. Applying a three times multiplier to the actual damages in this case would be appropriate. Therefore, even using $1,850 as Walters' lost license fee, when multiplied by three, statutory damages would exceed both the amount that Walters has requested and the maximum amount permitted in this proceeding.

VI. Conclusion

The Board's proposed default determination is to find that 365 GAT has committed copyright infringement and to award Walters $5,000 in statutory damages.

[2] Walters also suggests that considering the prices at which 365 GAT sells the products with the infringements, 365 GAT very likely made well more than $5,000 in revenues. Walters Decl. ¶¶ 67-70. While that is possible and logical, there is no evidence of 365 GAT's actual sales.