COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0037
March 14, 2025

Charles Osuchowski	*v.*	Tyler F. Lewis, Kathy E. Diaz, and Christopher Annis
CLAIMANT		**RESPONDENTS**

PROPOSED FINDINGS OF FACT

Claimant Charles Osuchowski ("Osuchowski" or "Claimant") submitted a Claimant Position Statement (Dkt. 50), witness statements by himself ("Osuchowski Statement"; Dkt. 51) and by Kris Garcia (Dkt. 54), evidence (Dkt. 52-53, 55-59, & 61-70), and an evidence list (Dkt. 60) on September 10, 2024. Respondents Tyler F. Lewis ("Lewis"), Kathy E. Diaz ("Diaz"), and Christopher Annis ("Annis") (together "Respondents") submitted a Respondents Position Statement (Dkt. 71), a witness statement by Joann Semander ("Semander Statement"; Dkt. 72), evidence (Dkt. 73), and an evidence list (Dkt. 74) on September 11, 2024. All parties appeared and testified at a Merits Conference on September 25, 2024. Based on the submissions and the witness testimony at the conference, the Copyright Claims Board ("Board") finds the following facts established.

Background

1. Respondents are members, and Claimant is a former member, of a musical group called Obsidian. Osuchowski Statement ¶ 1.
2. In March 2023, Obsidian's Facebook page described the group as a "Gothic rock band from Wilton Manors, Florida" with "3 EP releases: 'A Swamp,' 'Living Dead,' and 'Vultures.'" Claimant Exhibit O (Dkt. 61) at 1.
3. Claimant is a graphic designer and commercial artist. He became a member of Obsidian in 2018 and left the group on July 31, 2022. Osuchowski Statement ¶¶ 1-2; Claimant Exhibit A (Dkt. 62) at 5; Respondents Position Statement (Dkt. 71) at 1; Merits Conference Transcript ("Conference Tr.") at 7:05-7:41, 28:00-28:13 (on file with the Board).
4. Claimant created or co-created five works of visual art (the "Works") that appeared on Obsidian merchandise items while he was a member of the group. On October 26, 2022, Claimant submitted applications to register copyrights in the five works (the "Works") that are at issue in this case, and the Copyright Office issued certificates of registration for the Works, effective October 26, 2022, in November 2022. The registered Works are: "Eros" (Reg. No. VA 2-326-832), "A Swamp" (Reg. No. VA 2-326-833), "Living Dead" (Reg. No. VA 2-327-040), "Lips" (Reg. No. VA 2-327-042), and "Vultures" (Reg. No. VA 2-328-012). Claimant Exhibit J (Dkt. 66); Osuchowski Statement ¶¶ 1, 3; Claimant Position Statement (Dkt. 50) ¶¶ 1, 3.

5. Claimant acknowledges that when he was a member of Obsidian, Respondents had "the right to make copies of the Works, distribute them, and make public displays of them." Conference Tr. at 8:37-9:04; *id.* at 9:52-10:06 ("until I left the band, they had the right to use the imagery"). Therefore, during the period of time when Claimant was a member of Obsidian, the other members of Obsidian had at the minimum an oral or implied license to make copies of the Works, distribute them, and make public displays of them.
6. Claimant asserts that he told Respondents several times that their use of the Works was "contingent on his ongoing participation in the group." Claimant Position Statement ¶ 1; Osuchowski Statement ¶ 1; Claimant Exhibit B (Dkt. 63) at 5. Respondents dispute that point. Claimant Exhibit A at 5; *see* Semander Statement ¶ 7. The Board finds that the evidence on this issue is in equipoise and therefore cannot find that the license was subject to such a condition.
7. No written agreement relating to the creation or use of the Works existed among the band members while Claimant was a member of the band. *See* Response (Dkt. 42) ¶ 22; Claimant Exhibit A at 14.
8. On July 31, 2022, Claimant communicated to Lewis and Annis that he was leaving the band, sending them a text message that stated, "I quit," Respondents Exhibits G(2) & G(3) (Dkt. 73).
9. Upon leaving the band, Claimant 10told Respondents that they were no longer authorized to use the Works unless they purchased the rights to the Works from him. Osuchowski Statement ¶ 2; Claimant's Position Statement at 1; Claimant Exhibit B at 5.
10. Claimant's July 31, 2022 text message also noted that "below is an invoice for all out of pocket expenses I have incurred." The accompanying invoice sought $1401.65 "total due" for a number of items, including entries for a "Buy out of rights" for each of the five Works (or at least for "Vultures" and "Lips"),[1] stating with respect to each Work with such an entry that "if not paid, all occurances [sic] of artwork must be removed from social media, website, merchandise and all other promotional or product uses." Claimant Exhibit D (Dkt. 68); Respondents Exhibit G(3) (Dkt. 73).
11. In text message exchanges sent after July 31, 2022, Respondents agreed to pay Claimant the amount of $1401.65 "as requested on the invoice presented" and proposed to pay by check at the same time that they picked up their personal property that was in Claimant's possession. They also stated that "We are not purchasing anything physical off of you. We are paying a debt and paying for rights to digital images." However, disagreements concerning the manner of payment and when Claimant would release Respondents'

[1] Claimant states that a copy of the invoice he sent on July 31, 2022 is in Claimant Exhibit D, which shows entries for a "[b]uy out of rights" for each of the five Works. Claimant Evidence List (Dkt. 60). Respondents dispute that, and assert that the invoice in Claimant Exhibit D is an altered document created by Claimant at a later time. Respondent Evidence List (Dkt. 74); Conference Tr. at 01:24:21-01:25:47. They state that the invoice Claimant actually sent on July 31, 2022 is the one in Respondents Exhibit G(3), which includes entries for buy-outs of the rights for only two of the Works: "Vultures" and "Lips." *See* Conference Tr. at 01:25:52-01:26:39. The Board need not resolve the dispute to reach its final determination.

property prevented the consummation of the agreement. See Claimant Exhibit D (Dkt. 69) at 2-4; Osuchowski Statement ¶¶ 2-3; Respondent Exhibit J (Dkt. 73); Respondents Position Statement at 1.

12. On August 19, 2022, an attorney representing Claimant and Iron Forge Press, Inc. (apparently Claimant's graphic design business) sent letters to Respondents demanding that they and Obsidian Music LLC "immediately cease and desist from infringing the intellectual property owned by Charles Osuchowski, also known as Chuck Loose, and Iron Forge Press, Inc." The letters demanded the return of Claimant's intellectual property, including all copies in Respondents' possession, and for Respondents to immediately cease and desist all use of the five Works. In the alternative, it stated that Claimant was "willing to sell rights to use some or all the subject artwork[.]" Claimant Exhibit E (Dkt. 56); Claimant Position Statement at 2.
13. Claimant had custody of several items belonging to Respondents when he left the group, including band merchandise and Annis's guitar amp. Osuchowski Statement ¶ 3. Respondents, through Obsidian Music LLC, filed a lawsuit against Claimant in Broward County, Florida on August 23, 2022, seeking the return ("replevin") of physical property in Claimant's possession. Claimant filed a countersuit. Claimant and Annis (as manager of Obsidian Music LLC) signed a settlement agreement dated January 3, 2023. In the agreement, Claimant agreed to return specified merchandise and equipment to Obsidian Music LLC, which agreed to pay him $500, and each party agreed to release any and all state-law claims against the other party. However, the settlement excluded "potential federal claims by either party under the United States Copyright Act or any federal statute." *Id.* ¶¶ 3-4; Claimant Position Statement at 2; Claimant Exhibit K (Dkt. 53).

Findings Regarding the Allegedly Infringed Works

A Swamp

14. Because the Board concludes below that Respondents did not engage in infringement of the copyright in "A Swamp," the Board makes no findings regarding the authorship or copyright ownership of that work.

Living Dead

15. "Living Dead" is an illustration drawn by Claimant for use as cover art for a six-song Obsidian EP by the same title that was published on November 27, 2019, and was available online and on CD and cassette. Claimant Exhibit A at 11; Claimant Exhibit I (Dkt. 67) at 2; Claimant Exhibit J at 6; Conference Tr. at 23:39-24:08. Lewis had suggested the original concept for the artwork, which was based on his personal experience. Conference Tr. at 24:13-24:23, 27:15-27:47; Semander Statement ¶ 4.
16. In the process of the creation of the artwork, Lewis sent Claimant a picture of Lewis's outstretched left arm and hand, palm side up, and told Claimant that the artwork should show "[e]ssentially [an] arm like that with an Obsidian chunk being forced down it with the other hand." Respondents Exhibit I (Dkt. 73 at 22); Conference Tr. at 1:18:27-1:18:31, 1:21:02-1:21:06; Claimant Exhibit A at 6.

17. Lewis also suggested the color scheme of red and black. When Claimant sent Lewis black-and-white sketches for the cover art, Lewis "was very avid on it being red and black" and suggested that they "add more red to it." Conference Tr. at 1:18:47-1:18:55; 1:21:16-1:21:42; Claimant Exhibit A at 7.
18. The description that Lewis conveyed to Claimant is consistent with the appearance of the work that Claimant drew, in which the left hand and arm are in a similar position to that in the photograph Lewis had sent to Claimant. *See* Claimant Exhibit J at 6.
19. During the creation of "Living Dead," Claimant would share drafts of the work with Lewis and the other members of the band to receive their input. Conference Tr. at 24:39-25:18; 1:21:26-1:22:30.
20. The evidence shows that Claimant and Lewis collaborated in the creation of "Living Dead." Lewis gave Osuchowski a detailed description of the image that he wanted Osuchowski to draw, and Osuchowski added his own creative expression in executing Lewis's vision, with a mutual intention that their contributions be merged into a unitary whole to be used for the benefit of Obsidian. The process of creation was interactive, with Lewis offering comments on several iterations drawn by Osuchowski, and Osuchowski implementing Lewis's suggestions for revision while also employing his own creative skills as an artist.
21. Osuchowski and Lewis are coauthors of "Living Dead."

Eros

22. Although the Board concludes below that Respondents did not engage in any acts that would constitute an infringement of any copyright in "Eros," it makes the following findings of fact regarding copyrightability.
23. Claimant created "Eros," the cover art for the album *Eros, Hypnos, and Thanatos*, which was published online on January 30 or 31, 2020. Claimant Exhibit O at 2; Claimant Exhibit A at 11.
24. The most prominent visual element of "Eros" is a 17th-century painting by Giulio Carpioni titled "The Kingdom of Hypnos," which is included in "Eros" without alteration. Respondent Exhibit H (Dkt. 73); Conference Tr. at 39:01-39:11, 1:29:46-1:29:58. Claimant excluded the public domain work from the material claimed in his application to register the copyright. Claimant Position Statement at 5; Conference Tr. at 33:48-34:03.
25. While Claimant excluded the painting from his claim, he claimed authorship and ownership of certain "2-D artwork" within "Eros," specifically the composition: placing the band name at the top and the title below the painting. Claimant Exhibit J at 4, 6; Conference Tr. at 35:49-36:12; *see id.* at 34:05-34:20 (Osuchowski authored "the assembly and design of the layout; the creation of the composition setting it in a final form").
26. The only visual elements of "Eros," other than "The Kingdom of Hypnos," are the band name in a rounded, stylized font in all caps above the painting, the album title in a title-case typeface below the painting, and a black background. Claimant Exhibit J at 6. The Board finds that those are not creative elements that are protected by copyright. Claimant is not the author of the band name Obsidian or the stylized font band-name

logo. *See* Respondents Position Statement at 1; Response at ¶ 7(c) (describing Obsidian band-name logo designed by Natasha Dykes using a "free font" called Timepiece by FontMesa). He does not and cannot claim any copyright in the typeface, which he acknowledges is also a public domain element. Conference Tr. at 39:28-39:54. Claimant came up with the album title *Eros, Hypnos and Thanatos*, but he also does not claim copyright in the title; "it's from Greek mythology; I couldn't possibly claim authorship of it." *Id.* at 34:43-35:00. He claims copyright only in the composition. *Id.* at 39:40-39:46.

27. The band name and album title are words and short phrases that are not protected by copyright. *See* 37 C.F.R. § 202.1(a). The display of the band name in a stylized font, and of the album title in a title-caps lettering typeface, is also not protected by copyright. *See id.*

28. A composition that consists of only unprotectable elements may nevertheless be protected by copyright, if the composition is creative enough; however, the Board finds that the simple arrangement of unprotectable elements in "Eros"—consisting of (1) the name of the band centered at the top, (2) the public domain painting beneath the band's name, and (3) the name of the album centered beneath the painting—is not sufficient for copyright protection and cannot support an infringement claim.

Vultures

29. Because the Board concludes below that Respondents did not engage in infringement of the copyright in "Vultures," the Board makes no findings regarding the authorship or copyright ownership of that work.

Lips

30. Claimant conceived and began working on "Lips" in November 2013, about five years before Obsidian was formed. Claimant Exhibit B at 6; Claimant Exhibit I at 1. He created the work independently, without creative input from others, by taking photographs of people's lips and using them as references for his sketches. Conference Tr. at 20:19-21:55, 23:10-23:23. He licensed a non-party to use an earlier version of the work that he posted on Facebook in 2013. *Id.* at 22:00-22:29, 55:07-55:56; Claimant Exhibit B at 13; Claimant Exhibit R (Dkt. 70). The registration certificate, which issued with an effective date of registration of October 26, 2022, lists the year of completion as 2014 and the date of first publication as September 30, 2014. Claimant Exhibit J at 1.

31. "Lips" is a black-and-white illustration of a mouth. The white lips are flecked with irregular black spots; the bottom edges of both lips are rough and uneven. Below the upper lip, two large, white front teeth centered are between a pair of white fangs. A white tongue, outlined in black with black dot patterns simulating texture, sticks out toward the right over the lower lip. The space behind the teeth is black. *Id.* at 6.

32. While images such as "Lips" are commonplace, Claimant's composition at a minimum reflects a distinguishable variation from prior works.

Findings Regarding Infringing Uses

33. Respondents' uses of the Works during Claimant's years in Obsidian were with his consent. Claimant Exhibit A at 14; Conference Tr. at 8:46-9:04, 9:52-10:06.

34. *Physical Media.* Respondents had no physical media of any allegedly infringing copies of "A Swamp," "Living Dead," and "Eros" at the time Claimant left the band because they were "out of print production." Respondents Position Statement at 2; Conference Tr. at 57:07-57:23. Respondents did not create any physical media displaying any of the Works, such as CDs, cassettes, or other merchandise, after Claimant left Obsidian. Respondents Position Statement at 2; *see* Claimant Exhibit A at 11; Conference Tr. at 56:46-57:07, 1:47:43-1:48:00, 2:00:47-2:00:51. There is no evidence that Respondents sold or distributed physical copies of any Obsidian merchandise bearing any of the Works after Claimant left the band. However, even if any copies were sold or distributed during that time, the copies were made before Claimant left the band.

35. *Public Displays.* During the time when Claimant was a member of the band, copies of the Works were publicly displayed on the Obsidian website and other websites associated with the band, as well as on websites such as Bandcamp, Facebook, Instagram, Soundcloud, and Spotify where the band and its music were promoted. The Works were also publicly displayed in a merchandise display at live events. Claimant Exhibit L (Dkt. 55); Claimant Exhibit O; Claimant Exhibit A at 11; Respondents Exhibits C(3) & E(4) (Dkt. 73); Conference Tr. at 37:10-37:20.

36. Some of the works that were publicly displayed online, including some that remained online after he left the band, were posted by Claimant while he was still a member of the band. Conference Tr. at 58:40-59:06, 1:41:55-1:42:16. Some previously posted online displays of the Works remained online after Claimant left the band. Conference Tr. at 38:32-38:57; Claimant Exhibit L; Claimant Exhibit M (Dkt. 65). While the Florida lawsuit was pending, the band took works offline as they learned or were informed of allegedly infringing uses. Conference Tr. at 1:04:58-1:05:14, 1:05:50-1:06:20; 1:42:16-1:42:23. Whenever Respondents were notified (apart from Claimant's original notification that the Respondents should stop using the Works) that any of the Works was still up, they removed it,. *Id.* at 57:46-58:31.

37. However, some previously posted online displays remained online even after the January 2023 settlement. Conference Tr. 57:24-57:45; 2:01:32-2:02:00; Claimant Exhibit O.

38. The Board finds that with one exception, there is no evidence that at any point after July 2022, when Claimant left the band and demanded that Respondents cease using the Works, any of the Respondents posted any image of any of the Works (apart from "Living Dead," which Lewis coauthored with Claimant) online. The one exception related to "Lips."

39. Respondents released an album titled *Collection 1* on or about October 25, 2022. In November 2022, Obsidian's Bandcamp page displayed an image of what appears to be album or CD cover art that included the

"Lips" image. The Bandcamp page also displayed the following statements: "Collection 1 is our songs recorded from 2018 to 2020" and "Original logo art by Hayden Woof." Claimant Exhibit M (Dkt 65).

40. It is not clear which of the Respondents was responsible for posting the "Lips" image on the Bandcamp page, but the only witness who testified to personal knowledge regarding the circumstances surrounding the post was Lewis. See Conference Tr. at 01:51:59-01:53:58. The Board finds it reasonable to conclude that Lewis posted the image.

41. Claimant alleges that Respondents are responsible for other appearances of "Lips" and other Works on websites or social media controlled by or associated with Respondents, but there is no evidence that proves that any other allegedly infringing posts were made by any of the Respondents after Claimant left the band.

The parties have until **April 4, 2025**, to file submissions which detail which factual findings, if any, they dispute. If a party disagrees with the Board's factual finding(s), they must be specific both as to which factual finding(s) they disagree with and the evidence or testimony that contradicts the factual finding(s). Any filing that disagrees with these factual findings must follow the procedures set forth in 37 C.F.R. § 220.5(b) and be limited to five pages. Nothing should be attached to or filed with the response because a party may only rely on evidence or testimony already submitted, unless the presiding officer grants leave to do so. More information is available on page 9 of the **Smaller Claims** chapter of the CCB Handbook.

Copyright Claims Board