COPYRIGHT CLAIMS BOARD

**Docket number:** 22-CCB-0098
September 22, 2023

| Joe Hand Promotions, Inc. | *v.* | Arif Skyline Cafe LLC and Hellen A. Kassa |
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| **CLAIMANT** | | **RESPONDENT** |

## ORDER CONFIRMING PROPOSED DEFAULT DETERMINATION

On August 18, 2023, the Copyright Claims Board (Board) issued a Proposed Default Determination (Dkt. 37), proposing a finding that (a) Respondent Arif Skyline Cafe LLC has committed copyright infringement and Claimant Joe Hand Productions, Inc. should be awarded $3,000 in statutory damages, and (b) the presented evidence is insufficient to support a finding in favor of Claimant against Hellen A. Kassa ("Kassa"), and the claim against Kassa should be dismissed without prejudice.

On September 18, Joe Hand Productions, Inc. submitted a response, pursuant to 37 C.F.R. § 227.3(a)(2), to the portion of the Proposed Default Determination proposing to dismiss the claim against Hellen A. Kassa. Claimant's Response (Dkt. 38). For the reasons that follow, the Board finds that Claimant's submission does not change the Board's view of the case, and the Board will issue a separate order changing its Proposed Default Determination into a Final Determination and—along with the finding of liability against respondent Arif Skyline Café LLC—dismissing the claim against Hellen A Kassa without prejudice.

Claimant's response to the proposed default determination relies on the premise that the Board is required to simply take any allegations in the claim as fact in default proceedings. To the contrary, the CASE Act requires the Board to obtain supporting evidence from the claimant and not merely rely on unsubstantiated allegations in the claim. 17 U.S.C. § 1506(u)(1) ("The Copyright Claims Board shall require the claimant to submit relevant evidence and other information in support of the claimant's claim and any asserted damages and, upon review of such evidence and any other requested submissions from the claimant, shall determine whether the materials so submitted are sufficient to support a finding in favor of the claimant under applicable law and, if so, the appropriate relief and damages, if any, to be award.").

Claimant offered no evidence to show that Kassa actually "(1) possessed the **right and ability** to supervise the infringing activity; and (2) possessed an **obvious and direct** financial interest in the exploited copyrighted materials." *Universal Furniture Int'l, Inc. v. Frankel*, 538 Fed. Appx. 267, 272 (4th Cir. 2013) (quoting *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 513 (4th Cir. 2002)) (emphasis added). *See also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 & n. 9 (2005).

Claimant states that the Board should have ignored all of the cases cited in the Proposed Default Determination and focused solely on *EMI April Music, Inc. v. White*, 618 F. Supp. 2d 497, 505 (E.D. Va. 2009), from the Eastern District of Virginia in the Fourth Circuit, because, *if* there is "conflicting judicial precedent on an issue of substantive copyright law that cannot be reconciled, the Copyright Claims Board shall follow the law of the Federal jurisdiction in which the action could have been brought." Claimant's Response, at 4 (citing 17 U.S.C. § 1506(a)(2)). However, just because Claimant can cite to a single district court case where vicarious liability was found on a default judgment, that does not mean that there is a conflict of potentially binding precedent. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene,* 563 U.S. 692, 709 n. 7, 131 S. Ct. 2020, 2033 n. 7, 179 L. Ed. 2d 1118 n. 7 (2011) (citing 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed.2011)). It would be the law of the Fourth Circuit, rather than an opinion of a single judge in a single district court that governs what the Board must follow here <u>if there were</u> conflicting judicial precedent. *See Camreta,* 563 U.S. at 709 n 7.

There is not conflicting binding precedent in this case. Moreover, in its Proposed Default Determination, the Board cited multiple cases from courts of the Fourth Circuit for the proposition that the mere boilerplate allegation in a claim that an individual is one of the "members, managers, officers and/or principals of the entity owning and operating the Establishment," or even actually showing that an individual is one of the owners, without more, is not enough to prove vicarious liability.[1] *See, e.g.*, *Zuffa, LLC v. Ferrell*, No. 8:20-cv0273, 2021 WL 2315458, at *3-4 (D. Md. June 7, 2021) (denying default judgment as to individual defendant upon unsupported allegations that the individual was an "officer, director, shareholder, and/or principal" of the establishment" and had

[1] Claimant also argues that the Board conflates contributory and vicarious infringement. The cases and standard cited by the Board, however, clearly refer to vicarious liability.

"supervisory capacity and control"; vague allegation that the individual "'received a financial benefit' from [its] operations . . . does not equate with deriving financial gain from broadcasting the Fight. This is so even if the Court accepts as true that [the individual] advertised the Fight on [the establishment's] Facebook page."); *J & J Sports Productions, Inc. v. Mayreal II, LLC*, 849 F. Supp. 2d 586, 590-91 (D. Md. 2012) (comparing many vicarious liability cases under a similar standard and granting motion to dismiss individual defendants who did not have "personal knowledge of, or the ability to supervise and control, the alleged unlawful interception of the Program. For instance, there is no allegation that the individual defendants were present at the nightclub when the Program was shown, that they personally authorized the interception and display of the Program, or that they authorized advertisements for the display of the Program or the imposition of a cover charge to profit from the display."); *Scurmont LLC v. Firehouse Restaurant Group, Inc.*, No. 4:09-cv-00618-RBH, 2010 WL 11433199, at *15-16 (D.S.C. May 19, 2010) (rejecting "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" alleging vicarious liability for trademark infringement against a company's owners or officers that did not show that they participated in or directed the company's alleged acts); *Worsham v. Travel Options, Inc.*, No. JKB-14-2749, 2016 WL 4592373, at *5 (D. Md. Sept. 2, 2016) (discussing the tort principle of vicarious liability, stating that naked assertions "couched as factual allegations" are not enough, and reviewing cases declining to find personal liability absent evidence of "direct participation in the wrongdoing"); *Joe Hand Promotions, Inc. v. Up at Night LLC*, No. GJH-21-580, 2023 WL 375188, at *2-3 (D. Md. Jan. 23, 2023) (default cannot be granted against an officer, director, shareholder, member, or principal of the company without facts showing that the individual had the ability to supervise the activity and a direct financial benefit).

As noted above, the Board must evaluate the evidence and not merely rely on the allegations made in the claim as the court in *EMI April Music* did. Furthermore, the court in *EMI April Music* had both an affidavit corroborating the facts in the complaint and strong additional evidence that "Defendant had the right and ability to supervise the infringing activity. Despite a year of repeated warnings that he could not permit performers to infringe copyrights of ASCAP members, when ASCAP's investigator visited the establishment, he found that Defendant was permitting a band to play infringing music. Furthermore, after such visit, when given the opportunity to remedy such infringement by responding to ASCAP, Defendant failed to do so." *EMI April Music,* 618 F. Supp. at 507.

Similar evidence was not submitted in the present case, and thus *EMI April Music*, besides not presenting a conflict on potentially binding precedent, is distinguishable.

In addition to arguing that the Board has relied on "out-of-District case law" (ignoring that the Board still relied on case law from the Fourth Circuit and that there was no conflict of potentially binding precedent), Claimant also objects that the Board relied on "non-copyright infringement" case law. Claimant's Response, at 2, 4. It is true that some of the cases cited in the proposed determination were for violations of 47 U.S.C. §§ 553 and 605, provisions in federal telecommunications law making it unlawful to intercept, receive, or exhibit cable television transmissions without authority. However, the standard for liability under those provisions is "the standard for vicarious liability for copyright infringement." *See, e.g.*, *J & J Sports,* 849 F. Supp. 2d at 589, n. 5.

The Board has reviewed the Claimant's arguments against the Proposed Default Determination and does not find anything in those arguments that would cause the Board to change its Proposed Default Determination. The Board will proceed to issue its Proposed Default Determination as a Final Determination.

Copyright Claims Board