COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0005
December 14, 2023

Julie Dermansky	*V.*	Rule 62, Inc.
CLAIMANT		**RESPONDENTS**

DENIAL OF REQUEST FOR RECONSIDERATION DETERMINATION

On November 1, 2023, the Copyright Claims Board issued a Final Determination (Dkt. 55), which made its Proposed Default Determination (Dkt. 53) a final ruling because thirty days had passed and respondent, Rule 62, Inc. ("Respondent" or "Rule 62") had not filed any objections. The Final Determination found Rule 62 liable for copyright infringement and awarded claimant, Julie Dermansky ("Claimant" or "Dermansky") $1,350 in statutory damages.

On November 30, 2023, Claimant filed an "Application for Reconsideration," requesting that the Board reconsider its ruling and award Dermansky more than $1,350. (Dkt. 56). On December 5, 2023, Dermansky filed a Request for a Hearing (Dkt. 57) focusing on the concept that claimants might not continue to file CCB proceedings if they were not awarded higher damages for "willful copyright infringement."

As an initial matter, Dermansky's given reason for requesting a hearing is irrelevant to the request for reconsideration analysis, and hearings on requests for reconsideration are prohibited by 37 C.F.R. § 230.5. Dermansky's request for a hearing is therefore denied. The Board also notes that it is statutorily prohibited from "consider[ing] whether the infringement was committed willfully in making an award of statutory damages." 17 U.S.C. § 1504(e)(1)(A)(ii)(III).[1]

A hearing is also unnecessary because the Request for Reconsideration is facially meritless.

[1] For that reason, Claimant's argument that the Board should have considered the fact that Respondent removed CMI because "courts do consider the removal of CMI in the context of assessing willfulness as a statutory damage factor" is an invitation for the Board to ignore a statutory limitation on its authority.

Claimant merely rehashes the same arguments used when she requested a higher damages award in her default papers. In the Request for Reconsideration, she mainly disagrees with the Board's determination of a $450 base rate as a proxy for actual damages, which it then multiplied by three to arrive at the $1,350 final award. Dermansky particularly takes issue with the three data points *provided by Claimant* that the Board used in formulating the $450 base rate: (1) a $325 license, not for the aggregated Getty licenses where Dermansky was paid a few dollars per photo (and the Board agreed would not be fair to use), but for a separate license of a Dermansky photograph for a textbook; (2) the $450 Dermansky charged the Center for Investigative Reporting for the very work at issue; and, (3) the low end of the $500 to $3500 rate Dermansky affirmed that she typically charges for licenses. Supplemental Witness Statement of Julie Dermansky ¶ 6 (Dkt. 51).

Dermansky states that the Board should have ignored all of this evidence and instead only used settlement agreements Dermansky provided, which were agreed to by defendants attempting to resolve litigation in federal court. (Dkt. 29, 33, 36, 38, 41, & 42). This is a repeat of Dermansky's prior arguments, and the Board already held in its Final Determination that these settlement agreements are not relevant as a proxy of what a willing buyer would have been reasonably required to pay a willing seller, citing various cases. *See* Final Determination at 9-10.

Moreover, any issue with the evidence lies squarely on the shoulders of Dermansky. Dermansky was given the opportunity to submit whatever evidence she wished. She *chose* not to submit any comparable licenses. On August 24, 2023, the Board gave Dermansky a second bite at the apple, stating that while she referred multiple times in her declaration to having licensed her pre-existing photographs in the past, she failed to provide any such licenses. The Board stated "[a]s licenses for Ms. Dermansky's stock photographs—especially those for uses similar to those in the alleged infringement—are the best evidence of lost license fees, the Board is giving Ms. Dermansky time to submit additional evidence if she chooses. Therefore, claimant is ordered, by September 11, 2023, to submit through eCCB any additional licenses she wishes the Board to consider." Order to Submit Additional Evidence (Dkt. 45). In response to that order, Dermansky specifically chose not to supply the Board with further evidence. Therefore, Dermansky can hardly be surprised that—while the Board did not disregard Dermansky's testimony entirely—the

Board used the low-end of her stated $500 to $3500 range for prior licenses when she did not supply a single license actually within that range or above it.[2]

Claimant's allegation that the Board's award is "an abuse of discretion" is without merit. As explained in the Final Determination, the Board has "wide discretion to award statutory damages as long as they fall in the statutory range. The 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." Final Determination at 8 (citations and quotations omitted).

Finally, the Board rejects Dermansky's assertion that it should have increased the damages amount due to the "scarcity" of the photograph. Dermansky's main argument—again, just a re-worded version of her argument in her default papers—appears to be that she evaded security at the state capitol to get to her vantage point and, as such, she is not aware of other photographs of the building in the photograph taken from that same spot. There is no reason to believe such actions rise to the level of needing an additional multiplier beyond the three times actual damages multiplier the Board already employed. *See* Final Determination at 11 n.2.

In sum, the majority of Dermansky's arguments just repeat her arguments in her default papers, which is a violation of Board regulations, 37 C.F.R. § 230.2 *(*"The request shall not merely repeat any oral or written argument made to the Board as part of the proceeding"), but in any case, the Board finds them without merit.[3]

Therefore, Dermansky's request, that the Board reconsider its Final Determination finding Rule 62 liable for copyright infringement and awarding Dermansky $1,350 in statutory damages, is denied.

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[2] Dermansky also states that the range she testified to was for "editorial," not commercial uses. However, the Board used the evidence Dermansky chose to provide, and she did not provide any commercial information beyond the Getty licenses. *See* Final Determination at 6.

[3] The last section of Dermansky's Request for Reconsideration, at 10-11, has the header "The CCB's Decision Will Disincentivize Participation In The CCB," and implies that if the Board does not award windfalls to claimants, they are unlikely to use the CCB. (Dkt. 56). It is inappropriate for the Board to consider such a concept in its decisions. The Board's mandate is to decide each case fairly and in a well-reasoned manner based on the evidence provided to it.