COPYRIGHT CLAIMS BOARD

**Docket number:** 22-CCB-0263
February 8, 2024

| Michelle Shocked | *v.* | Gavin McInnes |
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| **CLAIMANT** | | **RESPONDENT** |

# FINAL DETERMINATION

This matter has been fully submitted by the parties. For the reasons that follow, the Copyright Claims Board ("Board") finds in favor of Claimant Michelle Shocked ("Shocked" or "Claimant") and awards her $750 in statutory damages.

## I. Procedural History

Claimant filed this claim on December 12, 2022, against Respondent Gavin McInnes ("McInnes" or "Respondent"). (Dkt. 1). After the Board initially found the December 12 claim not to be compliant with CCB rules and regulations (Dkt. 2), Shocked filed an Amended Claim on January 20, 2023. Claim (Dkt. 3). The Board found the Claim compliant and, on February 2, 2023, directed Claimant to serve McInnes within ninety days. (Dkt. 4). Claimant filed proofs of service showing that McInnes was served on February 15, 2023. (Dkt. 7, 9). Through counsel, McInnes filed his Response to the Claim on June 14, 2023. Response (Dkt. 16).

The Board held a pre-discovery conference on June 22, 2023, and a status conference on August 17, 2023. On August 30, 2023, the Board issued an order closing discovery as of September 1, 2023, and ordering the filing of written testimony. (Dkt. 17). As part of written testimony, Claimant filed evidence (Dkt. 20-22, 29, 34-35), two witness statements (her own, Dkt. 25, and one from Dan Kusner, Dkt. 26), and a Party Statement (Dkt. 24); Respondent filed a Party Statement (Dkt. 33); and Claimant filed a Reply Party Statement. (Dkt. 37). The written testimony phase was completed on January 24, 2024. This case is now ready for final determination.

## II. Factual History

The facts relevant to this Final Determination are largely uncontested.

Shocked states, and McInnes does not dispute, that Shocked is the copyright owner of the musical work and sound recording, both titled "Anchorage." Claim; Settlement and Reversion Attachments to Claim; Dkt. 20-22; Shocked Party Statement. Anchorage was registered as a musical work on March 15, 1989, as part of a collection of songs (Reg. No. PA000411583), and as a sound recording on September 19, 1988, as part of the album "Short, sharp, shocked" (Reg. No. SR0000100138). (Dkt. 20). Shocked states that her recording of Anchorage is three minutes and 24 seconds long. Shocked Party Statement.

The parties agree that in late 2022, McInnes played portions of Anchorage on the "Weak Nation" episode of his online show "Get Off My Lawn."[1] Claim; Response; Dkt. 24-26, 33-35. Shocked states that the use was unlicensed. Shocked Party Statement. McInnes claims that his use of Anchorage qualifies as fair use, primarily due to him using only one minute and 35 seconds of the work on his show (and he talked over the song for a short part of the time), and because he was using the song to discuss Shocked and how she was supposedly cancelled because of statements she had made in the past (unrelated to the song itself). Respondent Party Statement ¶¶ 4-33.

Shocked does not dispute McInnes' factual descriptions of the use, which are confirmed or given more context by the video evidence of the first approximately twelve minutes of the "Weak Nation" episode. Dkt. 34-35. As supplemented by that evidence, McInnes indicates:

- The work was used from three seconds into the show until the 1:38 mark. Respondent Party Statement ¶¶ 4-15; Dkt. 35.
- During nine seconds of the song—from 0:12 in the episode to 0:21—an announcer introduced McInnes' show. Respondent Party Statement ¶ 9; Dkt. 35.
- After that, the song ran uninterrupted for another 30 seconds. Respondent Party Statement ¶ 10; Dkt. 35.
- From 0:51 in the show until 1:38, the music continued, during which McInnes briefly sang along and then asked his producer if the music could be fast-forwarded. Even when McInnes and his producer were talking or singing, the music could clearly be heard the entire time. Respondent Party Statement ¶¶ 11-15; Dkt. 35.

[1] The Claim suggests that the show was first shown online on November 4, 2022, and there is evidence (*see* Witness Statement of Michelle Shocked ¶ 1 (Dkt. 25) ("Shocked Witness Statement")) that it was no later than December 2, 2022.

- McInnes then made a few unrelated comments before beginning a discussion about Shocked and her career at the 3:21 mark. Respondent Party Statement ¶¶ 16-28; Dkt. 35.
- In the episode, McInnes stated that he got the recording of Anchorage from Shocked's website, described Anchorage and other Shocked music as hard to find on major online music outlets, discussed how Shocked had been "cancelled" because of certain remarks she made—seemingly the main reason for McInnes to have a segment on Shocked in his show—and played an excerpt of a Piers Morgan interview with Shocked on that subject, described Shocked's album cover and the meaning behind it, and discussed a disagreement Shocked and McInnes had on Twitter around ten years prior about the album cover. Respondent Party Statement ¶¶ 19-24; Dkt. 35.
- McInnes also remarked that Shocked is "psychotic about copyright. She might come at me for opening up with Anchorage! But lawyers, I'd like you to know that this is an editorial choice. We're not using it to illustrate or further promote our product, we're using it in an editorial fashion to discuss—and we're still discussing it now, five minutes into the show." Respondent Party Statement ¶ 27; Dkt. 35.
- McInnes finished his discussion of Shocked by referring to a book he had read about a detective, which made him think of the album cover, and therefore Shocked. Respondent Party Statement ¶ 28; Dkt. 35.
- After discussing Shocked, McInnes transitioned to a broader discussion of "cancel culture subjects." Dkt. 35.

In her initial party statement, in referring to the market for her works, Shocked states that she had a "prior license agreement of $20,000" for a "less substantial use" than the use at issue here (Shocked Party Statement), but she did not elaborate or provide the license to the Board. Furthermore, there is no indication that she provided the license to McInnes in discovery, which would bar her from using the license as evidence at this point. *See* 37 C.F.R § 222.15(b)(1)(ii).[2] Shocked seeks statutory damages of $15,000 "per infringed work." Shocked Party Statement.

## III. Defenses

McInnes admits that he used one minute and 35 seconds of Anchorage at the beginning of Weak Nation, and the video evidence confirms that. Respondent Party Statement ¶¶ 8-15; Dkt. 35. The entire song is three minutes and

[2] McInnes states that he does not "know anything about that license, such as the date, the identity of the licensor or the specific nature of the use." Respondent Party Statement, ¶ 31. In her Reply Party Statement, at 3, Shocked still does not provide the license, but states that the license was for Disney to use a clip of a different song.

24 seconds (Shocked Party Statement), so McInnes' use was approximately half of the song. However, McInnes states that his use is not an infringement because it is fair use.

As the proponent of the affirmative defense of fair use, McInnes has the burden of proof on the issue. *See Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 590 (1994); *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443, 459 (9th Cir. 2020), *cert. den.*, 141 S. Ct. 2803 (2021).

Four non-exclusive factors are considered when analyzing a fair use defense: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107; *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1171 (9th Cir. 2012). Based on the evidence in the record, the Board cannot conclude that any of those factors weighs in favor of fair use, although it is arguable that the factor related to the effect on the market for Shocked's work is neutral.

The first factor calls for consideration of "whether the infringing work is transformative and whether it is commercial." *McGucken v. Pub Ocean Ltd.*, 42 F.4th 1149, 1158 (9th Cir. 2022). First, McInnes does not deny that his use of Anchorage was commercial, as it was used to open a commercial online program. *See also* Shocked Witness Statement ¶ 3. More importantly, for purposes of this discussion, he does not convincingly claim that it was meaningfully transformative. "When a copyrighted work is used simply to illustrate what that work already depicts, the infringer adds no 'further purpose or different character.'" *McGucken*, 42 F.4th at 1158 (quoting *Campbell*, 510 U.S. at 579). He states that his use of the work "was made in the course of reporting, criticizing, and commenting on it and on the career of Claimant." Respondent Party Statement ¶ 6. It is true that the analysis of the first fair use factor "may be guided by the examples given in the preamble to § 107," including criticism, comment, and news reporting. *Campbell*, 510 U.S. at 578. However, such a use may be fair, but "it is not sufficient itself to sustain a *per se* finding of fair use." *Monge*, 688 F.3d at 1171. Apart from stating his admiration for Anchorage, singing along with it, and noting "that song is gone" (that is, it cannot be found on the internet apart from on Claimant's website), McInnes engaged in no real criticism or commentary *of the work*. It is plausible that

McInnes, a non-lawyer, incorrectly thought—as he implied during his program—that his use of Anchorage was acceptable because he was using it during a segment where he was discussing Shocked. However, his discussion of Shocked had little relationship to the work or any need to play the work. In fact, there is no discernable reason as to why McInnes chose Anchorage over any other Shocked song. If McInnes were able to freely play half of a Shocked song just because he was discussing Shocked, then anyone could play a sound recording in a program if they then discuss the artist. *See, e.g.*, *Penguin Random House LLC v. Colting,* 270 F. Supp. 3d 736, 751 (S.D.N.Y. 2017) ("the aspects of a work that reproduce another's protected expression must be in service of commentary on that work"); *McGucken,* 42 F.4th at 1158 (unauthorized use of a photograph of a lake to comment on the lake as opposed to the photograph was not a fair use); *Dr. Seuss,* 983 F.3d at 452 (fair commentary should have critical bearing on the original work); William F. Patry, *Patry on Fair Use* § 3:55 (2023) ("[I]f a defendant's work describes the plot of a copyrighted work 'briefly' in order to add significant comment about the authors' plotting technique, then it may be protected by fair use. But if a defendant copies more than is necessary to facilitate 'comment or criticism,' then it will not be protected.") (citing *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.,* 996 F.2d 1366, 1374-75 (2d Cir. 1993)).

Both the second and third factors—the nature of the copyrighted work and the amount and substantiality of the portion used—clearly favor Shocked. Shocked's three minute and 24 second work is obviously creative expression, and McInnes used almost half of the entire work with the song clearly heard for almost the entire play time. Even if we were to credit McInnes' assertion that his use of the work was made in the course of reporting, criticizing, and commenting on it and on the career of Claimant, such extensive use goes well beyond what is reasonable. *See Chicago Bd. of Educ. v. Substance, Inc.,* 354 F.3d 624, 629 (7th Cir. 2003) (a fair use copier must copy no more than is reasonably necessary to enable him to pursue an aim that the law recognizes as proper).

As to the fourth factor, Shocked puts forward little evidence to show that there was an effect on the market for her work. She makes a fleeting reference in her Party Statement to having licensed her work (not necessarily the one at issue) in the past for $20,000 for a less substantial use than the one at issue, but provides no further details or

a copy of the license itself.[3] Nor is it plausible that those looking to hear Anchorage would be satisfied by hearing half of the song with McInnes talking or singing over part of it. In addition, there is the fact that Shocked, who appears to have removed much of her music from public distribution, found out about McInnes' use because one of the viewers of McInnes' program contacted Shocked asking, "Where can I buy your records?" Shocked Witness Statement ¶ 1.

On the other hand, even if Shocked has decided to mostly remove Anchorage from public distribution or not to license the work at all, she has the right to make that decision rather than see her works used without permission. *See Monge*, 688 F.3d at 1181 (deciding that the market factor tipped against defendant and stating that the factor "focuses on *potential*, not just actual, market harm") (emphasis in original). Just because an artist has chosen to make the market for a work scarce, the Board will not presume that unlicensed use does not harm that market, as that presumption would eviscerate the artist's ability to choose how the work is distributed. *See Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998).

In sum, the first three factors point clearly towards a finding of no fair use and the fourth factor is, at best, neutral. As such, McInnes has not satisfied his burden on the affirmative defense of fair use. He has no other viable defenses to Shocked's infringement claim. Therefore, the Board finds for Shocked on the issue of liability and moves to the question of damages.

## IV. Damages

Shocked requests statutory damages. Before the Board, the maximum award of statutory damages is $15,000 per work for works timely registered (either before the infringement started or within three months of first publication of the infringed work) and $7,500 for works not timely registered. 17 U.S.C. § 1504(e)(1)(A)(ii). The musical work was

[3] In her Reply Party Statement (Dkt. 37), at 2, Shocked gives slightly more details as to the $20,000 license (such as that it was for a different work and was for use by Disney), but does not attach the license (which she also does not appear to have provided to McInnes in discovery). In addition to the bar on using materials not given in discovery, Shocked does not give enough details to credit it as being for a similar use. She also raises for the first time a) the possibility that McInnes' statements, such as that the "song is gone" could have diverted traffic away from her web store, and b) a description of a second license for her work. Shocked cannot raise brand new issues in a reply statement. *See* 37 C.F.R § 222.15(c). In any case, the second license she describes suffers from the same issues as the first and there is no reason to credit her bare speculation on web traffic, especially when McInnes stated in the show that he obtained the work from her website.

registered on March 15, 1989, and the sound recording was registered on September 19, 1988. The infringement did not occur until 2022, so the maximum statutory award is $15,000 per work infringed. The minimum statutory award is $750 per work. *See* 17 U.S.C. §§ 504(c)(1) & 1504(e)(1)(A)(ii).

While Shocked asks for $15,000 "per infringed work," which could mean that she seeks $15,000 for the infringement of the musical work and $15,000 for the sound recording, the law is clear that when a sound recording embodies a musical work, and the sound recording is infringed such that the musical work is infringed along with it, that counts as one infringed work for statutory damages purposes. *See* 17 U.S.C. § 504(c)(1) (all parts of a derivative work "constitute one work" for determining the number of statutory damages awards); *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 94-95 (2d Cir. 2016) (explaining that a sound recording is a derivative work of a musical work, and therefore, under 17 U.S.C. § 504(c)(1), only one statutory award is allowed). Therefore, Shocked is entitled to one statutory award with a maximum of $15,000.

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*, 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).

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. 9-cv-433, 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. 19-cv-1066, 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 asserted 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, 165 (2d Cir. 2001).

In applying this principle, various courts have limited statutory damages to the $750 minimum where a plaintiff does not submit valid proof of actual damages. *See, e.g.*, *Atari Interactive*, 546 F. Supp. 3d at 888-89 ("Harmonizing these principles [related to statutory damages], the Court concludes that Atari may seek an award of minimum statutory damages without disclosing any damages calculations but, to avoid a potential windfall, it must provide some evidence of its lost profits or Redbubble's profits if it seeks an award greater than the statutory minimum."); *UMG Recordings, Inc. v. Davito,* No. 2:04-CV-479, 2005 WL 3776349, at *2 (N.D. Ind. June 17, 2005).

As discussed above, Shocked's limited statements related to harm are all conclusory even if not barred for failure to provide information in discovery or because the information was raised for the first time in a reply statement. Therefore, the Board concludes that she has provided no evidence tending to show actual damages. Moreover, there is no evidence that McInnes obtained monetary gains through his use of Anchorage. There has been no evidence presented related to any profits McInnes made directly attributable to the infringement, and it is unlikely that there were any such direct profits.

Based on the lack of any evidence of actual damages or any reasons to increase the award from the statutory minimum, the Board concludes that an award at the bottom of the permissible range of statutory damages is appropriate. Accordingly, the Board awards $750.

## V. Conclusion

The Board finds Respondent Gavin McInnes liable for infringement and awards Claimant Michelle Shocked $750 in statutory damages.

Copyright Claims Board