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McNeil v Blackbelt TV, Inc.
22-CCB-082

Request for Reconsideration by the Board
filed by Claimant, Martin McNeil

Introduction

On Augst 5, 2024, The Board issued its Final Determination in this matter. It found for Claimant, soundly rejecting all of the defenses of Respondent, but awarding only $1500 in statutory damages. The Board based its award on a hypothetical license value rather than the Claimant's published license rates, and in so doing relied solely on case law from inapplicable courts. Further, the Board, ignored that Respondent accepted that the published license rates were the proper measure of actual damages and, instead, created a number it, *sua sponte*, determined to be "fair." These are clear errors of law and fact.

Therefore, Claimant requests a reconsideration of the damages award, here. Specifically, the Board must reconsider its valuation of Claimant's lost license fees, under the applicable law of the Ninth Circuit, where the matter would be brought in Federal District Court, and award him an amount up to the $15,000 he originally requested. Further, he requests the Board address the bad faith behavior of Respondent, which was not addressed in its Final Determination in any manner, and award the fullest measure of attorney's fees available to Claimant.

Clear Errors of Law and Facts

Reconsideration is appropriate when the Board has made a "clear error of law or fact material to the outcome." *CCB Handbook*, Final Determination pdf, p. 3. "An error is a

'clear error' if it is unquestionably wrong and it is '**material**' (important) to the outcome such that the CCB's decision would have been different without the error." *Id*. (bold in original). Here, the Board has made such clear and material errors.

In its Final Determination (FD), the Board rejected Claimant's assertion that his lost license fee was published prior to the infringement and available to anyone interested in licensing the work via an online, fotoQuote-based calculator; therefore, it was his actual license fee and not hypothetical. The Board, however, stated that because McNeil had not ever issued a similar license, the published fotoQuote calculator was not "not probative of what a reasonable license fee would have been." FD at 9. The Board does acknowledge that "[t]he fees generated on McNeil's website are, at best, evidence of the price at which McNeil has offered a license" but continue "[t]hey tell the Board nothing about whether any willing buyer has agreed to that price." *Id*., (*internal citation removed*). Also, the Board notes that Claimant offered "no evidence regarding how the fotoQuote software works or the reliability of the data that it uses" *Id*.

Factually, the last is untrue. Claimant cited to fotoQuote's own website which explains that its numbers come from "actual sales records from photographers and photo buyers." Claimant's Opening Statement (Dkt 28), FN10. Further, Claimant avowed that he used this calculator for all comers--that is, he sets all his prices based off the fees suggested by that calculator--and explained his methodology for determining his lost license fee in detail. McNeil Declaration (Dkt 41) ¶¶14-19. Importantly, in the CCB, Claimant cannot prove up the proprietary methods of a third-party business except to cite its own words on the issue. That is, a party cannot introduce expert testimony in this

situation. Expert testimony is "highly disfavored" and only granted in "extraordinary circumstances" upon a showing that the proceeding "cannot fairly move forward" without it and, generally, the opposing party must so agree. *CCB Handbook*, Discovery pdf, p. 6.

Further, Claimant avowed that the calculator is and was on his website so that **anyone** could determine his prices for any of his works, prior to purchasing a license. Dkt 28 at 10, Dkt 41 ¶14. In other words, any buyer could accept his prices as displayed, or counteroffer a rate which Claimant would be free to reject, or the buyer could simply find some other photographer from whom to license a similar work for a price the buyer preferred. In short, the online calculator **is** the price of the license. There is nothing hypothetical about it. Instead, much like a car buyer who wants a new Porsche, they know they will have to pay close to if not the sticker price and won't get a 911 Turbo for the price of a Honda Civic. Since the Board rejected these facts, the Board has made a clear error of fact which has materially affected the award here.

As for the law, throughout its rejection of the legitimacy of the fotoQuote calculator, the Board cited several cases, none of which are appropriate here as none of them relating to fotoQuote are from California or the Ninth Circuit, whose precedents should apply in this matter. The only Ninth Circuit (or California federal) case cited is *Jarvis*, but that case is materially different in that it does not involve the fotoQuote calculator and, vitally, Jarvis **had actually licensed the works to K2 previously** and therefore had established a price range with that client-turned-infringer (*Jarvis v. K2, Inc.*, 486 F.3d 526, 534 (9th Cir. 2007)) and Jarvis also **had licensed out works to others for the**

same kind of use, thus establishing his price for that use (*id*. at 535).

For unknown reasons, the Board appears to have ignored a case Claimant cited in support, a recent UK case which relied on fotoQuote as an industry standard pricing tool to determine damages (Claimant's Reply (Dkt. 64) at FN 5). Instead, the Board performed its own research and cited cases from North Carolina and Georgia. FD at 9. However, it oddly failed to cite two cases from the Northern District of California, both more recent than those cited by the Board and *from the same circuit in which this matter would be brought*. Those cases acknowledge that fotoQuote is a reliable, citable pricing tool. *See Oppenheimer v. Plexuss, Inc.*, 21-cv-01422-JCS, (N.D. Cal. Sep. 7, 2021)("Given the relatively small difference between that and Oppenheimer's $5,770 estimate, however, and **affording some evidentiary value to Oppenheimer's assessment based on his own experience and the fotoQuote tool**, the undersigned finds Oppenheimer's estimate to be reasonable.")(bold added); and, *Werner v. Priceonomics, Inc.*, 4:20-cv-04006-HSG, 1 (N.D. Cal. Aug. 4, 2021)("5. Pursuant to the estimated license fee provided **by the industry standard software fotoQuote**, Werner's lost license fee for the Snuggery Image would be $667 per month for a total lost license fee of $26,680.")(bold added). Even odder, in another Final Determination, the Board itself cited yet another case where the damages were based on fotoQuote numbers, albeit for a different point: *Werner v Evolve Media, LLC*, No. 2:18-cv-7188, 2020WL 4012784 (C.D. Cal. June 22, 2020). *Dermansky v Rule 62, Inc*. 22-CCB-005 (Nov. 1, 2023) at 8. These cases must be considered and weighted more heavily since they come from the correct Circuit (and state).

Unlike the courts in *Oppenheimer* and the other cases cited above, here the Board not only ignores fotoQuote's status as an industry standard tool, it also completely disregards Claimant's *own testimony and expertise*. This is unconscionable as there is ample case law to the contrary. “[T]he copyright owner is competent to testify as to the extent to which the copyright's value has been injured or destroyed by defendant's actions. *Runge v. Lee,* 441 F.2d 579, 582 (9th Cir.), *cert. denied,* 404 U.S. 887, 92 S.Ct. 197, 30 L.Ed.2d 169 (1971).” *Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co.*, 807 F.2d 1110, 1118-19 (2d Cir. 1986). *See also Oppenheimer*, *supra*. In fact, even *On Davis* (cited by the Board) notes that an award of actual damages in the copyright context "should be broadly construed to favor victims of infringement." *Davis*, 246 F.3d at 165 (citing William F. Patry, Copyright Law and Practice 1167 (1994) ("Within reason, any ambiguities should be resolved in favor of the copyright owner."). Failure to rely on case law from the proper circuit is a clear error of law.

In reality, the situation in this case is not a hypothetical license fee but a published quote, one based on vast amounts of data and approved by a professional photographer Claimant as appropriate for the usage at issue; which the Board improperly ignored. The license issue here is rather less like in *On Davis* and more like in *Timex*:

> Timex argues that Polar Bear cannot recover the amount of Sepp's estimate because Polar Bear never charged that rate. This argument is curious. The $37,500 price tag reflects the amount Polar Bear actually quoted to Timex. Instead of paying the fee, Timex used Polar Bear's copyrighted footage without authorization. Having taken the copyrighted material, Timex is in no better position to haggle over the license fee than an ordinary thief and must accept the jury's valuation unless it exceeds the range of the reasonable market value. The

> proposed license fee was proffered before Timex's infringement. Nothing suggests that the fee was contrived or artificially inflated.

Polar Bear Prod. v. Timex Corp., 384 F.3d 700, 709 (9th Cir. 2004). Here, the fact that the license fee was available to all prior to the infringement has been improperly overlooked and, importantly, the fact that McNeil had never actually charged the rate the calculator showed was used against him by the Board; a clear error of law.

Also importantly, the Board relies on an alleged lack of evidence supporting the asserted license fee. However, the Board could have asked for additional evidence, as it did in 23-CCB-0003 (*Giardina v Petco Animal Supplies*) and 23-CCB-0382 (*Wareka v Carroll*). According to the CCB's Handbook, "After reviewing each party's written materials, the CCB can decide the case on the papers, or the CCB may decide to hold a hearing on the issues *if it thinks it would be helpful*." CCB Handbook, The Active Phase pdf at 3 (emphasis added).

Here, the Board had ample opportunity to ask at least two apparently vital questions in the almost eight months between the submission of the parties' final papers and its ruling: (1) How did Claimant calculate the license fee granted to Smuggling Duds, including the related discount; and (2) Does Claimant know or have additional evidence regarding how fotoQuote's pricing engine works? Claimant is at a loss as to why the Board didn't request any additional information, particularly since it relied on Claimant's discounted license rate to a friend and noted that the discount percentage was not specified. Instead, the Board baldly assumed 50% and thereby set the original license fee at $500. Worse yet, the Board justified its number in part by dividing Claimant's

asserted, **fotoQuote-derived** 8-year license rate by 8 rather than using his one-year license rate as shown. Specifically, In McNeil's evidence, he showed the rates for a license of 1 year through 8 years duration and explained that subsequent years are essentially discounted, *i.e.*, year 2 is not 2 times a one-year fee but rather 1.33 times the single year fee. McNeil Decl. ¶19. Thus, figuring an "average" yearly fee by simple division is mathematically inaccurate. A clear technical and factual error.

Moreover, in using the 8-year figure and dividing it by 8, the Board is being hypocritical in that fotoQuote's numbers were sufficient to rely on as a basis to **reduce** the actual damages, but not legitimate enough to accept as evidence of the actual lost license fees. This is a clear logical error, at best.

Most egregious, however, is that the Board is doing the work of Respondent for it, giving, at the very least, the appearance of bias. Specifically, Respondent, a sophisticated licensee and licensor of IP rights itself, whose sole owner and CEO has decades of experience in the entertainment industry, **did not object** in any manner to the idea that the online, fotoQuote-based calculator was the appropriate tool to measure actual damages here. Rather, it only objected to the factors put into that calculator, stating "McNeil's actual damages, which serve as the predicate for his statutory damages, are the loss of the reasonable license fee BBTV would have been expected to pay to post McNeil's photograph on Facebook (Ex. K)". Respondent's Statement (Dkt 63) at 8; Ex. K (Dkt 56). Respondent's Exhibit K consists of screenshots of McNeil's online calculator. Ex. K. Thus, *using that same tool,* Respondent calculated what it believed to be the appropriate measure of actual damages and, even at the lowest

number, those are HIGHER than what the Board assigned to the license: $638 (for one year) versus $500 (and $1282 for 2 years). *Id*. Thus, not only did the Board reject Claimant's expertise, it rejected Respondent's as well. In doing so, the Board effectively says to Claimaint and other rightsholders, "We feel that your prices are too high, and should be lower, so we're going to make our point known via our damages assessments."[1] Even more crucially, however, it is improper for the Board, like any supposedly impartial adjudicator, to make a party's argument for it. Here, that is precisely what it has done.

In sum, the award of $1500, based on an imaginary $500 license fee entirely created by the Board, is improper, unjust, and must be reconsidered due to the multiple clear errors of law and fact, as outlined above.

No Mention of Bad Faith Issue

Finally, the Board has not addressed an issue raised by Claimant: the bad faith acts of Respondent and the need for an award of attorney's fees because of them. There is no mention of this issue, despite it being addressed by both parties in their filings. This omission is also material and in error.

Conclusion

Claimant respectfully requests that the Board reconsider its $1500 award and, instead, award Claimant a sum of up to $15,000 in statutory damages, a number proven up by

[1] Sadly, this is not the first time the Board has done so. See, e.g., 23-CCB-0003 (rejecting both the Claimant's and the major corporation Respondent's valuations and inventing a much lower hypothetical license fee).

Claimant's evidence. Claimant also requests the Board address the issue of attorney's fees due to Respondent's bad faith in this matter.

Respectfully submitted,
s/Leslie Burns
Counsel for Claimant, Martin McNeil

Proof of Delivery

I hereby certify that on Friday, August 09, 2024, I provided a true and correct copy of the McNeil Request for Reconsideration to the following:

Blackbelt TV, Inc., represented by Rebecca Wolcott, served via ESERVICE at rebecca@thresholdentertainment.com

Signed: /s/ Leslie Burns