COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0082
October 1, 2024

Martin McNeil	*v.*	Blackbelt TV, Inc.
CLAIMANT		**RESPONDENT**

ORDER ON REQUEST FOR RECONSIDERATION

Claimant Martin McNeil (McNeil) initiated this copyright infringement claim on July 29, 2022. Claim (Dkt. 1). The Copyright Claims Board (Board) issued the Final Determination in this proceeding on August 5, 2024. (Dkt. 67). The Board found Respondent Blackbelt TV, Inc. (Blackbelt) liable for infringement and awarded McNeil $1,500 in statutory damages. *Id.* McNeil filed a request for reconsideration four days later. Request (Dkt. 68). Blackbelt filed a response to the Request on September 5, 2024. Response to Request (Dkt. 69).

A request for reconsideration of a final determination must identify a clear error of law or fact that was material to the outcome, or a technical mistake. 17 U.S.C. § 1506(w); 37 C.F.R. §§ 230.1-230.2. McNeil contends that:

> 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.

Request at 1.

The maximum statutory damages award from the Board is $15,000 per work. 17 U.S.C. § 1504(e)(1)(A)(ii). The minimum is $750 per work. 17 U.S.C. § 504(c)(1). McNeil requested the $15,000 maximum. Claim; McNeil Opening Party Statement (Dkt. 28) at 9 & 12. The $1,500 award to McNeil is double the minimum and within the range set by statute. The amount of an award within the statutory range is discretionary and "the court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima," and "the court's discretion and sense of justice are controlling." *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (*quoting F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952)).

McNeil argues that because of that wide discretion, "statutory damages are not to be based on actual damages" under Ninth Circuit law, McNeil Party Statement at 10, and "that statutory damages do not need to be 'tethered' to actual damages." Claimant's Reply Party Statement (Dkt. 64), at 6. But seeking to establish a relationship between statutory damages and actual damages is proper and common. *See* Final Determination at 8. "In determining statutory damages, courts often use estimates of actual damages or licensing fees." *Duffy Archive Ltd. v. Club Los Globos Corp.*, No. 2:20-cv-10791-ODW (JCx), 2021 WL 2580505, *4 (C.D. Cal. June 22, 2021) (citing *Michaels v. Nohr,* No. CV 15-06353-AB (JEMx), 2015 WL 12532177, at *9 (C.D. Cal. Dec. 17, 2015)). Courts routinely award

statutory damages based on a multiple of two to six times the lost licensing fee for the infringed work. *See* cases cited in Final Determination at 11.

In the only license McNeil has issued for the allegedly infringed photograph, he permitted Smuggling Duds Ltd. (Smuggling Duds) to publish seven photographs, including the one at issue, for £200. McNeil Declaration (Dkt. 41) ¶¶ 7-9 & 20. The Board construed McNeil's testimony about the rate paid in the light most favorable to him, as £200 per photograph, rather than £200 total. The uses of the photograph by Smuggling Duds and Blackbelt appear generally similar, and the Board treated the amount Smuggling Duds paid as a benchmark: "the best evidence of what a reasonable licensing fee for the use of the Work would be." Final Determination at 10. McNeil does not dispute that those uses were comparable and does not contend that treating that license rate as a benchmark was impermissible. He testified that he had given Smuggling Duds "a discounted rate," but he "said nothing about how deep of a discount the rate represented." *Id.* To calculate a hypothetical license rate, the Board considered those facts and "the slim record regarding damages that the parties have given the Board," and exercised its wide discretion to roughly double the £200 total of the Smuggling Duds licensing fee (approximately $260 at current exchange rates) to $500. *Id.* at 9-10. The Board tripled that $500 estimated licensing fee to arrive at the $1,500 award. *Id.* at 11.

McNeil questions why the Board did not ask him for more evidence probative of damages: "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." Request at 6. The Board may hold hearings "on issues of fact or law," 17 U.S.C. § 1506(p), and may request additional testimony or evidence "if it determines that such a hearing is appropriate or advisable." 37 C.F.R. § 222.16(a) & (f). But the Board typically relies on the evidence submitted. The Board had no need to ask for more evidence in this case because McNeil provided sufficient evidence on which to base a damages award. Shortcomings in his submissions are due to McNeil or his counsel, not the Board. A party cannot excuse its own failure to submit evidence that supports its demand by blaming the Board for failing to ask it for better evidence.

McNeil argues that the Board should have used a different benchmark altogether, based on a "fee calculator" on his website using fotoQuote software, to establish a hypothetical license rate for the infringing use. Request at 1-6; *see* McNeil Party Statement at 10-11; McNeil Declaration ¶¶ 14-20. McNeil does not contend that anyone has ever licensed a photograph from him on the terms that the software generates, and seems to concede that he has "not ever issued a similar license" on terms relevant to the infringing use. Request at 2. He appears to agree that "[t]he fees generated on McNeil's website are, at best, evidence of the price at which McNeil *has offered* a license." *Id.* (emphasis added). In fact, his argument that the fotoQuote-based calculator is available on his website "so that anyone could determine his prices for any of his works, prior to purchasing a license" and "could accept his prices as displayed, or counteroffer a rate which Claimant would be free to reject," *id.* at 3, actually explains why the calculator is not good evidence of what a reasonable license fee would have been. The fee quotes generated by McNeil's calculator "tell the Board nothing about whether any willing buyer has agreed to that price." Final

Determination at 9. In this case, "actual damages are what a willing buyer would have been reasonably required to pay to a willing seller . . . The question is not what the owner would have charged, but rather what is the fair market value." *Id.* (*quoting Jarvis v. K2 Inc.,* 486 F.3d 526, 533 (9th Cir. 2007)). Without evidence that anyone has paid McNeil the rates generated by his software, his subjective view that the software establishes a fair market rate is not probative. *See Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002) ("actual damages, and its accompanying 'market value' test, is 'essentially an objective rather than a subjective measure of damages'") (*quoting* Paul Goldstein, *Copyright*, § 12.1.1, at 12:14 (2002)). Claimant misreads *Polar Bear Productions, Inc. v. Timex Corp.,* 384 F.3d 700 (9th Cir. 2004) as supporting the proposition that the Board should have based its award on the proposed license fee generated by his calculator because it was "available to all prior to the infringement" despite the fact that he had never actually charged that rate. Request at 5-6. In *Polar Bear,* the court was applying a "deferential standard" to a jury award based on expert testimony, which in turn was based on the price the plaintiff had quoted to the defendant to produce the work appropriated by the defendant.

Moreover, McNeil provided no basis for the Board to rely on his fotoQuote-based calculations.[1] He offered "no evidence regarding how the fotoQuote software works or the reliability of the data that it uses." Final Determination at 9. His claim that he had offered such evidence is incorrect. Request at 2 (*citing* McNeil Declaration ¶¶ 14-19 and McNeil Party Statement at 10 n. 10). His Declaration indicated that the calculator outputs a fee quote when a user enters "usage criteria into the calculator," *id.* ¶ 17, but did not indicate how the software does so; and a hyperlink in a party statement footnote to a third party's website is not evidence. *See* 37 C.F.R. § 222.15(b). McNeil notes that some courts have relied on fotoQuote calculations as evidence of rates that other photographs might obtain, when supported by evidence of actual license fees received by the plaintiff – information not present here. Request at 4. However, as accurately noted by Blackbelt, *see* Response to Request at 2-4, the cases cited by McNeil offer scant support for relying on fotoQuote estimates, and no support for relying solely on such evidence.[2]

The Board acted well within its sound discretion to disregard McNeil's speculative evidence and base its award on the only probative damages evidence he submitted.[3] He licensed Smuggling Duds to use the photograph for

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[1] McNeil repeatedly refers to fotoQuote an "an industry standard tool," *see* Request at 4-5, but he offers no evidence whatsoever that would support that conclusory statement.

[2] McNeil asserts that "Respondent accepted that the published license rates were the proper measure of actual damages," Request at 1; *see also id.* at 7-8 (asserting that Blackbelt "did not object to the idea that the online, fotoQuote-based calculator was the appropriate tool to measure actual damages here"). The Board does not interpret Blackbelt's testimony as endorsing the use of the fotoQuote calculator; Blackbelt asserted that "the foregoing amount is too generous" because it did not show what a fee for Blackbelt's actual use would have been. Response to Request at 11. In any event, it is the responsibility of the Board to determine the measure of damages based on the evidence in the record, and not simply to draw within the lines suggested by the parties.

[3] McNeil mischaracterizes as "hypocritical" the Board's observation that "[a]lthough there is insufficient evidence to support McNeil's calculated license fee, a reasonable license fee of $500 is not far off from McNeil's own calculation when the limited use is considered," misconstruing that statement as relying on the calculated fee to support its award. Request at 7, referring to Final Determination at 11 n. 3. To be clear, that observation was made

about $260. The Board did not err by awarding McNeil more than five times that amount. His objections to the award lack merit. The Request does not identify any legal or factual error that would justify reconsideration of the damages award in the Final Determination, nor does it give the Board any second thoughts regarding the award.

McNeil also states that the Board has not addressed his claim for attorney's fees based on "bad faith behavior" by Blackbelt. Request at 1, 9. The alleged bad-faith conduct included Blackbelt's behavior in pre-filing negotiations that failed, initial errors by Blackbelt regarding designation of its authorized representative, requests for additional discovery that were denied, and the assertion of defenses based on the statute of limitations and an alleged license. *See* McNeil Opening Party Statement at 12.

"Bad-faith conduct occurs when a party pursues a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact. Such conduct includes any actions taken in support of a claim, counterclaim, or defense and may occur *at any point during a proceeding before the Board, including before a proceeding becomes an active proceeding*." 37 C.F.R. § 220.1(c) (emphasis added). As such, a finding of bad-faith conduct cannot be based on pre-claim behavior, which does not occur "during a proceeding." Moreover, not every denied request for discovery or failed defense satisfies the definition of bad faith. The Board has no difficulty concluding that none of the conduct McNeil complains of meets the test for bad faith, just as McNeil's meritless request for attorney's fees fails to meet that test.

The request for reconsideration, including the request for attorney's fees, is denied.

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simply to note that even if McNeil's calculation did provide a valid basis for calculating value, the resulting award would not necessarily be dissimilar.