Copyright Claims Board **Docket No. 24-CCB-0241**
February 18, 2025

Wireless Tow Lights, Inc., Claimant v. ESafety Lights, LLC, Respondent

RESPONDENT ESAFETY LIGHTS LLC'S RESPONSE TO WIRELESS TOW LIGHTS, INC.'S AMENDED CLAIM

I. Introduction

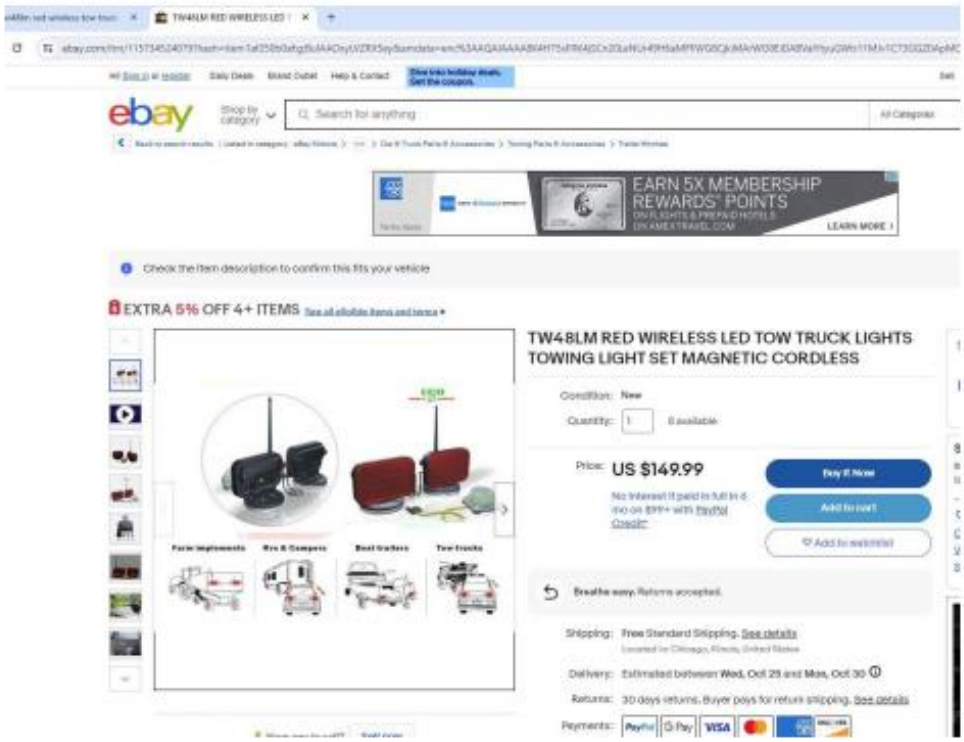
ESafety Lights, LLC ("ESafety Lights") is an Illinois limited liability company located in Chicago and in the business of providing safety lighting solutions. Claimant, Wireless Tow Lights, Inc. is a Texas corporation located in Lubbock, TX. Claimant alleges that ESafety Lights infringed Claimant's registered copyrighted image entitled "Farm Tractor towing a Trailer with Tow Lights" VA 1-199-304 which was registered April 7, 2020 ("Registered Work"). ESafety Lights denies that it ever infringed the Registered Work, asserts that the instant Claim has been brought in bad faith, and in any event, ESafety Lights promptly removed all use of its ESafety Lights Image (defined below) upon learning of this Claim. ESafety Lights respectfully requests that the Board dismiss this claim.

II. Background

A. ESafety Lights Image.

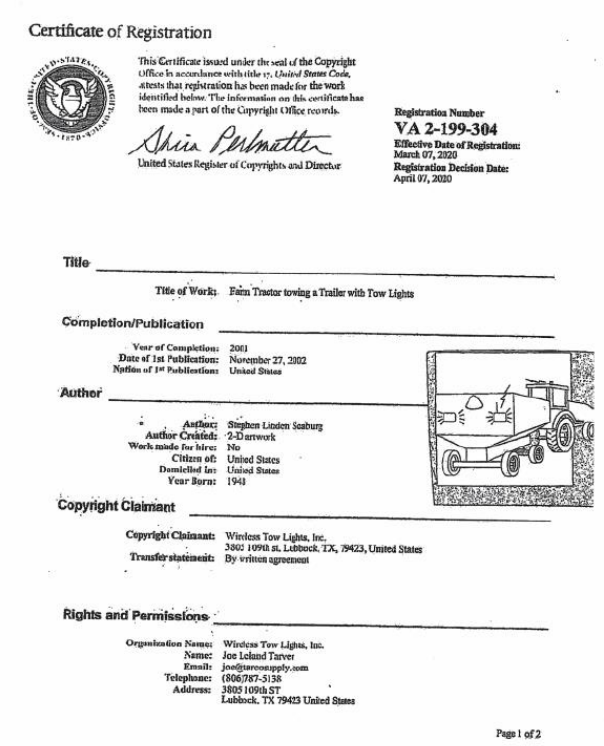
Sometime in 2012 or 2013, a representative from ESafety Lights conducted a Google search to locate images of tow lights for advertising to demonstrate how its tow light products appear on vehicles. It located images of four vehicles with red colored tow lights attached to the rear of each vehicle and combined them into one image ("4 Vehicle Image"). There was no copyright or owner or restrictive notice on any of the individual images. This representative believed that the individual images contained in the 4 Vehicle Image were in the public domain and available for use. This representative then used that 4 Vehicle Image in an advertisement

featuring its own tow lights products prominently on top of the 4 Vehicle Image as a demonstrative showing of how typical tow lights are displayed ("ESafety Lights Image"). This product line was not very successful, and ultimately, ESafety Lights discontinued the product line, removing any use of the ESafety Lights Image from its website. In order to sell off remaining inventory, ESafety Lights posted the tow lights for sale using the ESafety Lights Image on an EBay page (See Page 2 of Case doc. #1).



B. The 2023 Claim is Dismissed.

Claimant filed its first claim asserting copyright infringement against ESafety Lights on or about September 9, 2023 ("2023 Claim"). The 2023 Claim included this image of the VA 1-199-304 Registration (See Exhibit A):



Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

United States Register of Copyrights and Director

Registration Number
VA 2-199-304
Effective Date of Registration:
March 07, 2020
Registration Decision Date:
April 07, 2020

Title

Title of Work: Farm Tractor towing a Trailer with Tow Lights

Completion/Publication

Year of Completion: 2001
Date of 1st Publication: November 27, 2002
Nation of 1st Publication: United States

Author

Author: Stephen Linden Seaburg
Author Created: 2-D artwork
Work made for hire: No
Citizen of: United States
Domiciled in: United States
Year Born: 1941

Copyright Claimant

Copyright Claimant: Wireless Tow Lights, Inc.
3802 109th st, Lubbock, TX, 79423, United States
Transfer statement: By written agreement

Rights and Permissions

Organization Name: Wireless Tow Lights, Inc.
Name: Joe Leland Tarver
Email: joe@tarcosupply.com
Telephone: (806)787-5138
Address: 3805 109th ST
Lubbock, TX 79423 United States

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The 2023 Claim asserted that ESafety Lights' EBay product listing and advertising infringed upon the Registered Work (2023-CCB-0298). Claimant failed to properly serve notice of the 2023 Claim upon ESafety Lights and on January 31, 2024 the Board dismissed the 2023 Claim.

C. ESafety Learns of the 2023 Claim.

Claimant's representative actually delivered notice of the 2023 Claim to ESafety Lights sometime in late March 2024. Upon receipt of Claimant's notice, ESafety Lights immediately removed its EBay page, thus removing the last use of its ESafety Lights Image. ESafety Lights engaged counsel, who promptly contacted Claimant's owner, Joe Tarver, on March 29, 2024. During a telephone call that morning, memorialized in a follow-up email, counsel told Mr. Tarver that ESafety Lights believed that it had the right to use the ESafety Lights Image, and yet in an abundance of caution, had already ceased all use everywhere - upon receipt of Claimant's communication. (See Exhibit B).

D. Claimant Files The 2024 Claim.

Five months later, on or about August 21, 2024, Claimant filed a new claim against ESafety Lights asserting the same infringement as in the 2023 Claim ("2024 Claim") (Case Doc. No. 1). On September 18, 2024, Claimant amended its Claim ("Amended 2024 Claim") (Case Doc. No. 3) and later that month served the Notice of Claim upon the Registered Agent for ESafety Lights. In the 2024 Claim and the Amended 2024 Claim, Claimant used the same evidence of alleged infringement as it had attached to the 2023 Claim. Claimant asserted that ESafety Lights' wrongful activity consisted of "Reproduce the work; Distribute copies of the work; Publicly display the work." Further, Claimant asserted that the infringing is "ongoing." It claimed that the infringement dates were "December 15, 2020 – Present." It claimed that the infringing acts were for "Broadcast Online for sales purposes; Violation can be seen on ebay: TW48LM Red Wireless Led Tow Truck Lights Towing Light set Magnetic Cordless." Claimant asserted that the artwork in its Copyright No. VA 2-199-304 "is identical to the art work in currently viewable online" as described in the Claim. In the 2024 Claim, Claimant chose not to update its claims made to the Board to reflect its knowledge that the alleged infringement was no longer ongoing, viewable online, or that the alleged infringement dates were from December 15, 2020 to March 2024. Despite the opportunity to amend its claims in the Amended 2024 Claim, Claimant continued to falsely assert to the Board that ESafety Lights was continuing to allegedly infringe the Registered Work.

III. Legal Analysis

A. There is no infringement.

In order to succeed on a claim for copyright infringement, Claimant must show: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). A

copyright registration certificate is prima facie evidence of ownership and validity if made before first publication of the work or within five years after first publication. *See* 17 U.S.C. § 410(c). Claimant's Registered Work registration indicates that the work was published on November 27, 2002, but the registration was not effective until March 7, 2020. Thus, Claimant's registration is not prima facie evidence of its ownership and validity of the Registered Work.

The validity of Claimant's Registered Work is questionable. The outline of a tractor pulling a farm equipment trailer may enjoy no copyright protection because it is merely the idea of expressing a tractor pulling a farm equipment trailer which are elements in the public domain. Claimant's Registered Work is the basic outline of the everyday objects with no originality. Even if Claimant's Registered Work can enjoy copyright protection, that protection extends only to the particular compilation of the public domain elements.

1. ESafety Lights did not copy the Registered Work.

Claimant fails to allege direct evidence that ESafety Lights copied the Registered Work. In the absence of direct evidence, copying may be proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectable material in the two works. *See, e.g., Boisson v. Banian, Ltd.*, 273 F.3d 262, 267-68 (2d Cir. 2001); *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007); *Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colo*., 689 F.3d 29, 48-49 (1st Cir. 2012); *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d. 800, 806 (D.C. Cir. 1987). Copying can also be inferred without additional evidence of access if the allegedly infringed work and the allegedly infringing work are "so strikingly similar as to preclude the possibility of independent creation[.]" *Lipton v. Nature Co*., 71 F.3d 464, 471 (2d Cir. 1995) (internal quotation marks and citation omitted). *See 3 also Unicolors, 853 F.3d at 985; JCW Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 915 (7th Cir.

2007). In order to prove substantial similarity, Claimant must show that the allegedly infringing work is substantially similar to protectable elements of the Registered Work. Claimant cannot show ESafety Lights image is substantially similar to protectable elements of its Registered Work.

2. ESafety Lights did not know about or have access to the Registered Work

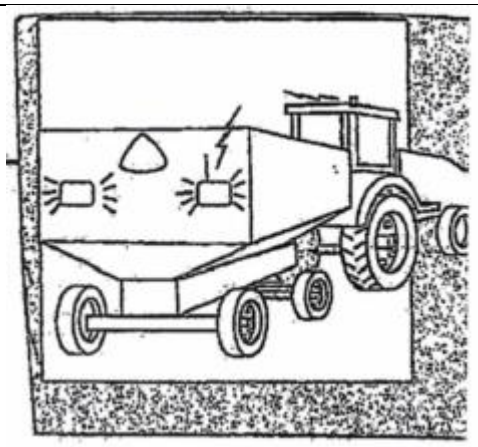
Claimant must prove that ESafety Lights had access to the Registered Work. Claimant failed to provide any evidence to demonstrate that its Registered Work enjoys widespread dissemination or that the ESafety Lights had access to the Registered Work. A representative for ESafety Lights conducted a Google Image Search of the Registered Work image and was not able to find any use of the mark. A recent search similarly resulted in no evidence of the Registered Work online. (See Exhibit C).

3. The works are not substantially similar.

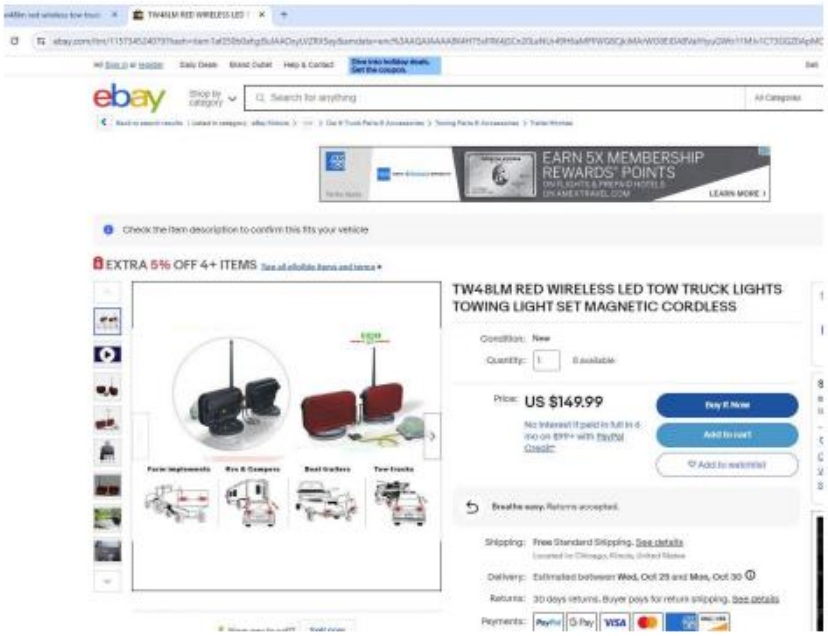
i. The ESafety Lights Image is not substantially similar to the Registered Work. The Registered Work depicts a black and white pencil drawing of a truck facing in the right direction toward the top of the image with a trailer behind the truck. The back of a trailer shows two rectangle lights with lines emanating from the edges of them. There is a triangle in the center of the back of the trailer. The front of the truck is cut off from the image. There are dotted lines, between the truck's large rear wheel and the trailer.

ii. In contrast, the ESafety Lights Image shows four separate line drawings of vehicles being towed with red tow lights attached to the rear item being towed. The image for "Farm Implements" shows a truck facing to the left top of the page with a trailer making up the main part of the image. There are two red tow lights on the back with a wire connecting them. There is no triangle between the red lights. This Farm Implements depiction constitutes but a small quarter of a four-image portion demonstrating how ESafety Lights' tow lights can be used by vehicles. The

large top two-thirds of the ESafety Lights Image features actual photographs of the ESafety Lights' products – red and black safety tow lights.

Registered Work	ESafety Lights Image
	

iii. The ESafety Lights Image used the Farm Implements image on an even smaller portion of the larger advertisement that appeared on the eBay site.



B. Any similarity between the Registered Work and the ESafety Lights Image is innocent and inadvertent and does not warrant any award of damages including any statutory damages.

Assuming, arguendo, that the Registered Work is protected, and that despite ESafety Lights' statement that it believed that the image it downloaded was in the public domain, if the Board determines that there was improper use of the Registered Work, it was innocent and inadvertent.

Pursuant to § 504(c)(2) of the Copyright Act, an infringer's intent can affect the amount of statutory damages awarded: only a minimal award may be warranted where the infringement is innocent; a higher award may be warranted only where the infringer acted willfully. *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 143 (2d Cir. 2010). Where, as here, infringement is found to have been innocent or nominal, statutory damages may be reduced to the statutory minimum of $200 per occurrence. *D.C. Comics v. Mini Gift Shop*, 912 F.2d 29, 35 (2d Cir. 1990) (*citing* 17 U.S.C. § 504(c)(2) finding when infringer was not aware and had no reason to believe that the acts constituted infringement, the court may reduce the award of statutory damages to $200). While the burden of proving innocence is on the alleged infringer in a copyright action, the burden of proving willfulness is on the copyright holder. *Bryant* at 143. A copyright holder seeking to prove that a copier's infringement was willful must show that the infringer "had knowledge that its conduct represented infringement or […] recklessly disregarded the possibility." *Twin Peaks Prods., Inc. v. Publ'ns. Int'l Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993).

The Claimant has not claimed that the alleged infringement was intentional, and the facts would not support such an allegation. ESafety Lights' conduct was innocent and any alleged infringement of the Registered Work was inadvertent. The facts that support ESafety Lights' claim are: i) ESafety Lights looked for and did not find a copyright notice or other indicia of ownership connected to the image it downloaded from a Google search; ii) ESafety Lights was unaware that

the use of the image could potentially constitute infringement; iii) Because the drawing is relatively simple, without any copyright notice or watermark, ESafety Lights was not aware that use for mere demonstrative purposes could potentially constitute infringement; and iv) ESafety Lights immediately demonstrated good faith and erred on the side of cooperation in immediately removing the image upon receipt of the original notice of allegations, even prior to conducting its own diligence into the viability of the allegations. ESafety Lights' actions in the course of its use of the ESafety Lights Image and its conduct immediately after receipt of the notice of allegations reflect ESafety Lights' innocent intent.

Courts also consider a range of factual considerations when determining the amount of statutory damages to award for copyright infringement. Some of the primary considerations are, "[(a)] the expenses saved, and profits earned, by the infringer; [(b)] the revenue lost by the copyright holder; [(c)] the deterrent effect on the infringer and third parties; [(d)] the infringer's cooperation in providing evidence concerning the value of the infringing material; and [(e)] the conduct and attitude of the parties." *N.A.S. Impor. Corp. v. Chenson Enter., Inc.*, 968 F.2d 250, 252–53 (2d Cir. 1992).

Here, the record supports no award of damages; or at most the minimum amount of reduced statutory damages. ESafety Lights earned no profits from its display of the ESafety Lights Image as a small portion of the displayed image on eBay. Claimant provided no evidence that it lost revenue based on the ESafety Lights Image. Furthermore, Claimant likely suffered minimal to no lost revenue, as indicated by its election of statutory damages in lieu of actual damages. Statutory damages above the reduced minimum of $200 would have no added deterrent effect since ESafety Lights is responsible for paying its own attorney's fees. *See Bryant*, 603 F.3d at 145 (holding that where profits from infringing sales were meager, deterrence was effectuated by infringing party

paying their own attorney's fees). ESafety Lights cooperated fully upon receipt of the notice of allegations and there has been no allegation that it engaged in willful infringement. Finally, ESafety Lights has at all times acted in good faith and with good intent in immediately removing the alleged infringing materials. Courts are clear that minimum statutory awards are warranted where, as here, only nominal damages are incurred. *UMG Recodings, Inc. v. Davito*, 2005 WL 3776349 (N.D. Ind.) (holding that damages of $200 were sufficient where the damages caused by download of 8 songs was "minimal"); *see also Malibu Media, LLC v. Brenneman* 2013 WL 6560387 (N.D. Ind.) ("However, the deterrent aspect of statutory damages should not be turned into a windfall where, as here, the Plaintiff has suffered only minimal damages.").

ESafety Lights lacked the requisite alleged intent, demonstrated by the presence of facts and factors which lend to innocence. In addition to the nominal nature of the alleged damages, in the absence of a finding of fair use, any award of statutory damages should be limited to $200.

C. Claimant Acted in Bad Faith.

Claimant acted in bad faith filing the 2024 Claim and continued to act in bad faith by filing the Amended 2024 Claim.

By submitting materials or advocating positions before the Board, a participant certifies that to the best of the participant's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, that it is not being presented for any improper purpose. 37 C.F.R. §§ 220.1(c); 232.2(a).

In the 2024 Claim, Claimant failed to share with the Board that the alleged infringement by ESafety Lights ended. Claimant even had the opportunity a second time to update the information in its Amended 2024 Claim. On or about March 29, 2024, Claimant spoke to counsel for ESafety Lights and received written confirmation from counsel confirming that ESafety Lights

immediately ceased all use everywhere once they received the 2023 Claim. Despite these communications in early 2024, Claimant chose to file the 2024 Claim *and* the Amended 2024 Claim to assert ESafety Lights was continuing to infringe, allowed the infringing material to be viewable online, and alleged the timeline of the infringement was from December 15, 2020 to Present.

Claimant is acting in bad faith before the Board by improperly asserting the alleged infringement was ongoing, the timeline of the alleged infringement, and the continued wrongful activities concerning the alleged infringing materials.

D. If ESafety Lights' Use of the Registered Work Constitutes Infringement, ESafety Lights' Use of the Registered Work Should be Considered Fair Use.

Assuming, arguendo, that the Board finds the Registered Work is a protected copyrighted work, and that the ESafety Lights Image infringed Claimant's rights, ESafety Lights asserts that its use of the ESafety Lights Image constitutes fair use. The fair use doctrine, which is codified under § 107 of the Copyright Act is a statutory exception to copyright infringement.

Whether "fair use" exists is a case-by-case determination of four non-exclusive factors in light of the purposes of copyright. The factors are: (1) "the purpose and character of the use;" (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. In light of the above standard, ESafety Lights' uses of the ESafety Lights Image is fair use.

This Amended 2024 Claim involves the use of the image of a simple outline of a tractor and attached farm equipment with two brake lights. The ESafety Lights Image appeared in an eBay listing for ESafety Lights' goods, but that was merely used to show how tow lights can be used on various vehicles. Furthermore, the Farm Implements portion of the ESafety Lights Image used was

in the lower left hand corner of a larger image showing the actual product along with other outlined drawings of where the brake lights could be placed on items such as towed cars, boat trailers, or RVs and campers. Thus, in relation to ESafety Lights' full image, the portion allegedly resembling the Registered Work was only a very small portion. A work is "transformative" when the new work does not "merely supersede the objects of the original creation" but rather "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell v. Acuff–Rose Music, Inc.,* 510 U.S. 569, 590, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994). To the extent that the ESafety Lights Image allegedly resembled the Registered Work, ESafety Lights transformed the Registered Work into a different content such that Registered Work is transformed into a new creation. Here, the ESafety Lights Image appears in a new context to serve a different purpose. The use of the Registered Work was reasonable in light of the purpose of the ESafety Lights' full image, thus the "amount and substantiality" factor weighs heavily in favor of fair use. There is no meaningful evidence that the use of ESafety Lights Image affected the market or value of the Registered Work. Claimant provided no evidence that the Registered Work appears anywhere online, is in use in any manner, or has any market for licensing.

In sum, the weight of the fair use factors clearly favors fair use in this case. Accordingly, the Board should dismiss the claim against ESafety Lights with prejudice.

IV. Conclusion

In light of the foregoing, ESafety Lights requests the Board dismiss the claim against it with prejudice.

Claimant cannot succeed on a claim for copyright infringement because it cannot show ownership of a valid copyright, nor that ESafety Lights copied the Registered Work. ESafety Lights did not know about or have access to the Registered Work. Furthermore, the works are not

substantially similar. Even if the Board determines that ESafety Lights used the Registered Work and that such use constitutes infringement, the infringement was inadvertent and innocent. There is no evidence of damages because the Registered Work is not used online, and Claimant is acting in bad faith. Absent a finding of fair use, given the innocent intent; lack of profit earned from ESafety Lights' display of the ESafety Lights Image; minimal, if any, lost sales for Claimant; and ESafety Lights' cooperation, attitude, and conduct upon receipt of the 2023 Claim and continued Amended 2024 Claim, there should be no award of damages, or at most any award to Claimant should be limited to the minimum statutory damages of $200.

To the best of the signatory's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the allegations and other factual contentions made above have evidentiary support.

ESafety Lights, LLC, Respondent
By: UB Greensfelder, LLP
Susan Meyer
smeyer@ubglaw.com
312-368-6619
Jocelyn Smith
jsmith@ubglaw.com
614-229-0044