

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LARRY G. PHILPOT,           :           16cv1277 (DLC)
                             :
                             :           Plaintiff,
                             :
                             :           -v-
                             :           OPINION AND ORDER
MUSIC TIMES LLC d/b/a MUSICTIMES.COM, :           ACCEPTING REPORT
                             :           AND RECOMMENDATION
                             :
                             :           Defendant.
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DENISE COTE, District Judge:

On July 5, 2016, the Court entered default against defendant Music Times LLC d/b/a musictimes.com ("Music Times"), and referred the matter to Magistrate Judge Debra Freeman for an inquest and Report and Recommendation as to damages. On March 29, 2017, Judge Freeman issued her Report and Recommendation. Neither party submitted objections. For the following reasons, the Report's recommendation is adopted and a default judgment is entered against Music Times in the amount of \$5,000 plus \$400 in costs.

The plaintiff commenced this action on February 19, 2016. He was assisted by counsel in filing the complaint, and with the statement of damages, but has otherwise primarily proceeded pro se. The plaintiff makes his living through professional photography, but also allows a small number of his "iconic" photographs to be used through unpaid Creative Commons licenses,

in particular, the Attribution-Share Alike 3.0 Unported license. The complaint alleges that Music Times reproduced and distributed two Creative Commons licensed photographs without complying with the licenses and without any other permission or authorization. The complaint alleges violations of the Copyright Act and Copyright Revisions Act, 17 U.S.C. §§ 101 et seq. (the "Copyright Act"), and the Digital Millennium Copyright Act at 17 U.S.C. § 103 (the "DMCA").

When considering a report and recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). "To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record." SEC v. Boock, 09cv8261 (DLC), 2015 WL 4605286, at *2 (S.D.N.Y. July 31, 2015) (citation omitted).

The Court finds no clear error on the face of the record. In determining the damages recoverable as a result of the defendant's copyright infringement, the Report correctly concluded that the plaintiff had plausibly alleged that by copying and reproducing the two photographs the defendant infringed the plaintiff's copyright, which in the absence of an answer or any other response establishes the defendant's

liability as a matter of law.¹ The Copyright Act provides statutory damages "in a sum of not less than \$750 or more than \$30,000 as the court considers just" for infringement with respect to any one work. 18 U.S.C. § 504(c)(1). The plaintiff offered no evidence regarding actual damages or the market value of the copyrighted photographs. The Report reasonably found that "[t]aking into account that Plaintiff has not shown any loss of licensing fees and that the alleged infringing conduct involved only two instances of unauthorized reproduction -- but that the Defendant's violation of Plaintiff's rights must be accepted as deliberate and purposeful," a statutory damages award of \$5,000 is sufficient to compensate the plaintiff and to punish the defendant for its willful infringement.


The Report recommends that the Court exercise its discretion to deny attorneys' fees to the plaintiff, because the Proposed Findings contains no request for attorneys' fees or costs, was not accompanied by supporting documentation to substantiate a claim for such an award, and the role of counsel appeared limited from the record. The Report recommends the plaintiff be awarded costs for the filing fee of \$400 listed on the Court's docket.

¹ The plaintiff's Proposed Findings sought damages for copyright infringement only, abandoning his separate claim under the DMCA.

CONCLUSION

Finding no clear error in Magistrate Judge Freeman's Report, the Report is adopted without modification. The Clerk of Court shall enter judgment against Music Times for statutory damages of \$5,000 and \$400 in costs. Appellate review of this decision is unavailable because neither party filed written objections to the Magistrate Judge's Report. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

Dated: New York, New York
May 9, 2017



DENISE COTE
United States District Judge