UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

VIRAL DRM, LLC,

Plaintiff,

v. Case No.: 8:23-cv-2628-TPB-LSG

HARDEE BROADCASTING, LLC,

Defendant.
_____/

REPORT AND RECOMMENDATION

The plaintiff Viral DRM, LLC, moves under Rule 55(b)(2), Federal Rules of Civil Procedure, and Local Rule 1.10(c), for a default judgment against the defendant Hardee Broadcasting, LLC. As explained below, I recommend granting the motion in part and awarding $30,000.00 in statutory damages and $4,517.00 in reasonable attorney's fees and taxable costs.

I. BACKGROUND

Viral DRM is a professional videography company that owns copyrights to and commercially licenses videos. Doc. 1 at ¶10. On November 16, 2023, Viral DRM sued the defendant Hardee Broadcasting, LLC, for copyright infringement under the Copyright Act, 17 U.S.C. § 101, et seq. Doc. 1 at ¶1. The complaint alleges that Viral DRM owns the copyright to a March 21, 2022, video of a tornado in Elgin, Texas. Doc. 1 at ¶2. Videographer Brian Emfinger authored and published the video. A month after creating the video, Emfinger registered the video with the U.S.

Copyright Office. Doc. 1 at ¶14-17. Emfinger then assigned his copyright to two individuals, who then assigned the copyright to Viral DRM. Doc. 1 at ¶18.

Hardee Broadcasting owns and operates a social media account under the name "@wauc1310am" on www.facebook.com. Doc. 1 at ¶3, 19-23. Viral DRM alleges that, without permission or authorization from the plaintiff, Hardee Broadcasting copied and displayed this video on its social media account on or around March 22, 2022. Doc. 1 at ¶4, 25. On April 18, 2022, Viral DRM discovered the infringement, which is ongoing. Docs. 1 at ¶26, 29-1 at ¶16. Viral DRM alleges that Hardee Broadcasting knowingly engaged in, and received a financial benefit from, the infringement. Doc. 1 at ¶32-36. Viral DRM alleges substantial harm from the alleged conduct and potential harm to the market for the video. Doc. 1 at ¶38-41.

After failing to perfect service on the defendant despite numerous attempts, Viral DRM sought permission to serve the defendant by e-mail. Doc. 11. A March 19, 2024, order grants the request and further directs Viral DRM to serve the Secretary of State and to send process by registered mail. Doc. 15. Viral DRM served the defendant as directed, and the defendant failed to plead or otherwise defend. Docs. 17, 18, 20-1, 21-23. Thus, Viral DRM sought and obtained a clerk's default. Docs. 24-26. In the motion for default judgment, Viral DRM seeks statutory damages of five times the fair market value of the defendant's use of the video, plus attorney's fees and costs. Doc. 29 at ¶13.

II. DISCUSSION

a. A sufficient factual basis exists for a default judgment.

Rule 55(b) permits a judgment by default if a defendant fails to plead or defend. *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1244 (11th Cir. 2015). By defaulting, the defendant admits the factual allegations of the complaint. *Id.* at 1245; *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1307 (11th Cir. 2009). If a sufficient factual basis exists for the judgment, a default judgment is warranted. *Cotton v. Massachusetts Mut. Life Ins. Co.*, 402 F.3d 1267, 1278 (11th Cir. 2005). A hearing on damages is not required. *Giovanno v. Fabec*, 804 F.3d 1361, 1366 (11th Cir. 2015). If the plaintiff seeks an amount certain and the record contains the essential evidence and factual allegations supporting the claim, a hearing to determine the amount of damages is unnecessary. FED. R. CIV. P. 55(b); *S.E.C. v. Smyth*, 420 F.3d 1225, 1231-32 (11th Cir. 2005).

Viral DRM sues Hardee Broadcasting for copyright infringement. A claim for copyright infringement requires (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. *Compulife Software, Inc. v. Newman*, 959 F.3d 1288, 1301 (11th Cir. 2020); *Prokos v. Exceedant, LLC*, 2019 WL 5698379, *1 (M.D. Fla. Aug. 27, 2019). Under 17 U.S.C. § 410(c), a certificate of registration "made before or within five years after first publication of the work" constitutes prima facie evidence of the validity of the copyright. *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1233 (11th Cir. 2010).

Here, Viral DRM alleges a sufficient factual basis for a default judgment. Viral DRM alleges ownership of a valid copyright and shows that the March 21, 2022, video created by Emfinger bears copyright Registration Number PA 2-354-516. Docs. 1 at ¶42, 29-2. Viral DRM never granted Hardee Broadcasting a license or right to use the video in any manner. Docs. 1 at ¶45, 29-1 at ¶10. Nonetheless, without permission or authorization Hardee Broadcasting copied and published the video on Hardee Broadcasting's social media accounts. Docs. 1 at ¶48, 29-1 at ¶9.

b. Viral DRM may recover statutory damages.

Under 17 U.S.C. § 412, an owner must register the copyright to recover damages and attorney's fees under 17 U.S.C. §§ 504 or 505. If the infringement occurs after first publication but before registration, the owner must register the work no later than three months after first publication. 17 U.S.C. § 412(2). Here, Emfinger created the video on March 21, 2022, and registered the video on April 22, 2022. Doc. 29-1 at ¶4-5. Thus, registration occurred within three months after the first publication.

A copyright owner may obtain from an infringer either (1) the owner's actual damages and any additional profits of the infringer or (2) statutory damages. 17 U.S.C. § 504(a). Those damages range from a minimum of $750 to a maximum of $30,000. 17 U.S.C. § 504(c)(1). Furthermore, "[s]tatutory damages are appropriate when an infringer's non-disclosure of pertinent facts leaves damages uncertain." *Clever Covers, Inc. v. Southwest Fla. Storm Defense, LLC*, 554 F. Supp. 2d 1303, 1310 (M.D. Fla. 2008) (citing *Sara Lee Corp. v. Bags of New York, Inc.*, 36 F. Supp. 2d 161,

165-66 (S.D.N.Y. 1999)). In a default judgment case, "statutory damages are especially appropriate . . . because the information needed to prove actual damages is uniquely within the infringer's control and is not disclosed." *Id.* at 1311.

Proof of willful infringement raises the statutory maximum to $150,000. 17 U.S.C. § 504(c)(2). "Willfully" in Section 504(c)(2) means that the defendant "knows his actions constitute an infringement; the actions need not have been malicious." *Cable/Home Comm. Corp. v. Network Productions, Inc.*, 902 F.2d 829, 851 (11th Cir. 1990). A finding of willfulness is also warranted if "a defendant recklessly disregarded the possibility that it was infringing a copyright." *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1271 (11th Cir. 2015) (citing other circuit precedent finding that willful includes reckless disregard). If the infringement is willful, "deterrence of future violations is a legitimate consideration because defendants must not be able to sneer in the face of copyright owners and copyright laws." *Id.* (citations omitted). To determine willful infringement, the court "may consider the expenses saved by and the profits reaped by the infringer, revenues lost by the copyright holder as a result of the infringement, and the infringer's state of mind, whether willful, knowing, or innocent." *Clever Covers,* 554 F. Supp. 2d at 1310 (citing *Nintendo of Am., Inc. v. Ketchum*, 830 F. Supp. 1443, 1445 (M.D. Fla. 1993)). A district court has wide discretion to determine the amount of damages within the statutory range. *Cable/Home*, 902 F.2d at 852.

Here, Viral DRM seeks $105,000.00 in statutory damages under Section 504(c)(2), which amount is five times Viral DRM's typical licensing fee of

$21,000.00. Doc. 29-1 at ¶20. Viral DRM submits as proof of its typical fee an invoice paid by another customer for the same video. Doc. 29-3. Viral DRM says and the invoice shows that payment of the fee results in a thirty-day, non-exclusive license to use the video. Docs. 29-1 at ¶15; 29-3. Viral DRM argues that this amount will compensate for Viral DRM's damages, punish the defendant's willful conduct, and deter future infringement. Doc. 29 at 8. To support a finding of willfulness, Viral DRM asserts that Hardee Broadcasting "has continued to engage in a pattern of inaction through its failure to respond and/or appear in this action[.]" Doc. 29-1 at ¶19. According to the declaration of Micheal Brandon Clement, Viral DRM's founding member and representative, Hardee Broadcasting's infringement began on March 22, 2022, and remained active as of July 24, 2024. Doc. 29-1 at ¶16.

The complaint alleges that Hardee Broadcasting's infringement was willful because the defendant "was aware of facts or circumstances from which the determination regarding the Infringement was apparent." Doc. 1 at ¶31-33. The complaint provides no factual allegations, however, supporting the conclusion that Hardee Broadcasting knew or had reason to know that its action constituted an infringement of Viral DRM's copyright. In fact, the complaint demonstrates that, when Hardee Broadcasting first posted the video, the owner held no copyright. Doc. 1 at ¶14, 16, 24; Doc. 1-2. No factual allegation in the complaint supports the conclusion that Hardee Broadcasting later became aware of the copyright (or knew, at the very least, of facts and circumstances suggesting a copyright and potential infringement). At most, the circumstances show that, in April 2024, Viral DRM

properly served Hardee Broadcasting, which failed both to respond to the complaint and to remove the video from its social media accounts. Docs. 21-23, 29-1 at ¶16.

Although the factual allegations, which by its default Hardee Broadcasting admits, demonstrate infringement, I find nothing aside from the default to justify a finding of willfulness. Some courts infer willfulness from the default. *Arista Records, Inc. v. Beker Enter., Inc.*, 298 F. Supp. 2d 1310, 1313 (S.D. Fla. 2003) (collecting cases). However, in those cases, the inference derives support from factual allegations and circumstances not present (or not pleaded) here. *See Arista*, 298 F. Supp. 2d at 1311 (explaining that the defendants had been selling "obviously illegitimate" CDs in their store and ignored three separate demand letters from the plaintiff); *Microsoft Corp. v. Wen*, 2001 WL 1456654, *3, *6 (N.D. Cal. Nov. 13, 2001) (defendants appeared and ignored numerous deadlines and violated court orders); *Sony Music Entertainment v. Cassette Production, Inc.*, 1996 WL 673158, *5 (D.N.J. Sept. 30, 1996) (explaining that both the complaint and testimony supported finding that the defendant's copying of ninety-one sound recordings was willful); *Fallaci v. New Gazette Literary Corp.*, 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983) (explaining that, "as the publisher of a copyrighted newspaper, the defendant was or should have been aware that its unauthorized republication of a Washington Post article constituted copyright infringement."); *Original Appalachian Artworks, Inc. v. Yuil Inter. Trading Corp.*, 1987 WL 123986, *9 (S.D.N.Y. Oct. 2, 1987) (finding willfulness based, in part, on defendants' selling infringing merchandise even after the government seized an infringing shipment).

Here, Viral DRM presents no factual allegation from which the Court can infer willfulness, which requires either Hardee Broadcasting's knowledge or reckless disregard of infringement. I find that an inference of willfulness is unwarranted based solely on Hardee Broadcasting's default in this action. Accordingly, I recommend statutory damages under Section 504(c)(1) in the amount of $30,000.00, which is the maximum allowed under Section 504(c)(1) and which exceeds Viral DRM's typical licensing fee of $21,000.00.

c. Viral DRM may recover a reasonable attorney's fee.

Section 505 of Title 17 permits the "recovery of full costs" as well as an award of a "reasonable attorney's fee" to the prevailing party. "An award of fees is generally discretionary, seldom mandatory." *Casella v. Morris*, 820 F.2d 362, 366 (11th Cir. 1987). The only statutory requirement is reasonableness of the fee. *Id.* A finding of willful infringement is unnecessary. *Id.* "[F]ees are regularly awarded where a Court finds that they would deter future infringement, ensure that copyright owners have equal access to the Court, and penalize the losing party as well as compensate the prevailing party." *Nexstar Media, Inc. v. Jay Is 4 Just. Podcast, LLC*, 2023 WL 3645846, at *2 (M.D. Fla. May 25, 2023).

The "lodestar" method determines the amount of a reasonable attorney's fee. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This method requires multiplying a reasonable number of hours by a reasonable hourly rate. *Jacob v. Bais Yisroel Community Ctr.*, No. 8:23-cv-2703-KKM-AAS, 2024 WL 4103601, *2 (M.D. Fla. Aug. 23, 2024). The criteria for assessing reasonableness include (1) the time and

labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly; (2) the fee customarily charged in the locality for similar legal services; (3) the amount involved and the results obtained; and (4) whether the fee is fixed or contingent. *Id.* (describing these and other criteria under the Lodestar approach). The burden of proving reasonableness rests with the movant. *Norman v. Housing Auth.*, 836 F.2d 1292, 1299 (11th Cir. 1988). A court must specifically determine the reasonableness of the hours and hourly rate, even if the movant's evidence is unopposed. "A conclusory statement that a fee is reasonable in light of the success obtained is generally insufficient." *Norman*, 836 F.2d at 1304 (citing *Hensley*, 461 U.S. at 439 n.15); *McKenzie v. Cooper, Levins & Pastko, Inc.*, 900 F.2d 1183, 1184 (11th Cir. 1993).

A reasonable rate is the prevailing market rate in the relevant legal community for similar services by a lawyer of comparable skills, experience, and reputation. *Norman*, 836 F.2d at 1299. The relevant market is "'the place where the case is filed.'" *ACLU v. Barnes*, 168 F.3d 423, 437 (11th Cir. 1999). The movant must provide satisfactory evidence that the requested rate comports with the prevailing market rate. *Norman*, 836 F.2d at 1299. Satisfactory evidence "necessarily must speak to rates actually billed and paid in similar lawsuits." *Id.* at 1299. However, "'[t]he court . . . is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent

judgment either with or without the aid of witnesses as to value.'" *Id.* at 1303 (quoting *Campbell v. Green*, 112 F.2d 143, 144 (5th Cir. 1940)).

Viral DRM seeks $5,937.50 in attorney's fees. Doc. 29. Viral DRM's lawyer Craig Sanders provides a declaration describing his legal skills and experience, which spans three decades, as well as the skills and experience of his eighth-year associate Jaymie Sabilia-Heffert and two paralegals. Doc. 29-4 at ¶3. His rate is $750 an hour, and Sabilia-Heffert's is $500 an hour. Doc. 29-4 at ¶4-5. His paralegal's rates are $125 an hour. Sanders opines that the fees and hours charged by his firm are reasonable. Doc. 29-4 at ¶9.

Attached to Sanders' declaration is a report from the American Intellectual Property Law Association showing average hourly billing rates in 2020 for intellectual property ("IP") lawyers by years of experience. Doc. 29-5. This document shows that the average hourly rate for an equity partner practicing IP law in the southeast is between $453 and $564 an hour. Doc. 29-5 at 6. The average rate by years of experience for a thirty-year lawyer is $577. *Id.* For a partner-track attorney, the range in the southeast is $399 to $413 and for eight years of experience is $446. Doc. 29-5 at ¶7.

Although Sanders cites a recent Middle District of Florida case awarding these rates on a default judgment, that opinion contains no reasonableness analysis. *See Coppa v. Urban Music News, LLC*, Case No. 8:23-cv-2567-WFJ-CPT, Doc. 25 (M.D. Fla. 2024). Sanders provides no other information about the prevailing market rate in Tampa or the rates that his clients pay him for litigation in the Middle District of

Florida. Sanders' opinion that is firm's rates are reasonable is not enough, particularly because recent and thoroughly reasoned precedent from the Tampa Division finds that a reasonable rate is between $400 and $475 for an experienced attorney in an IP case. *See Broadcast Music, Inc. v. Taste and Spirit, LLC*, 2023 WL 3353044, *5 (M.D. Fla. Apr. 21, 2023) (approving a rate of $400 an hour for an attorney with more than twenty years' experience); *Reiffer v Legendary Journeys, Inc.*, 2019 WL 2029973, *5 (M.D. Fla. Apr. 10, 2019) (approving a rate of $395 an hour for an attorney with more than thirty years' experience); *Fuccillo v. Century Enter., Inc.*, 2020 WL 1431714, *5 (M.D. Fla. Jan. 15, 2020) (finding that $400 to $475 an hour is reasonable for an attorney with twenty-eight years' experience). Accordingly, based on recent precedent in similar cases in the Tampa Division, as well as the evidence submitted by Sanders, I find that a reasonable rate for Sanders' time in this case is $500 an hour.

Similarly, recent precedent in the Tampa Division finds reasonable an hourly rate between $300 and $350 an hour for an attorney with experience comparable to Sabilia-Heffert. *Wareka v. Luxury Lab, LLC*, 2023 WL 9119240, *5 (M.D. Fla. Nov. 9, 2023) (finding $350 an hour reasonable for an attorney with fourteen years' experience); *Fuccillo*, 2020 WL 1431714 at *5; *Reiffer*, 2019 WL 2029973 at *5. Accordingly, I find that a reasonable rate for Sabilia-Heffert's time in this case is $325 an hour.

The hourly rates of Sanders' two paralegals appear reasonable and consistent with rates awarded in the Tampa Division. *See Plum Creek Technology, LLC v. Next*

Cloud, LLC, 2020 WL 3317897, *5 (M.D. Fla. Jun. 3, 2020) (explaining that "the median hourly rate for paralegals in Florida is $125" and citing cases). Furthermore, the hours spent by the paralegals and the attorneys appear reasonable and neither excessive nor redundant.

Accordingly, based the reduced rates for Sanders and Sabilia-Heffert, the total fee award should be the following:

Timekeeper	Position	Rate	Hours	Final
Craig B. Sanders	Senior partner (30 yrs)	$500.00	.6	$300.00
Jaymie Sabilia-Heffert	Associate (8 yrs)	$325.00	10.3	$3,347.50
Julie Busch	Paralegal	$125.00	1.9	$237.50
Laura Costigan	Paralegal	$125.00	.8	$100.00
Total				**$3,985.00**

d. Viral DRM may recover taxable costs.

Rule 54(d)(1), Federal Rules of Civil Procedure, provides that costs "should be allowed to the prevailing party." The categories of recoverable are those delineated in 28 U.S.C. § 1920. *Artisan Contractors Ass'n of Am. v. Frontier Ins. Co.*, 275 F.3d 1038, 1039 (11th Cir. 2001) (finding that costs under Section 505 are limited to those taxable under 28 U.S.C. §§ 1920 and 1821(b)); *Arcadian Fertilizer, L.P., v. MPW Indus. Servs., Inc.*, 249 F.3d 1293, 1296 (11th Cir. 2001). Those categories are:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section [28 U.S.C. § 1923];

> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under [28 U.S.C. § 1828].

28 U.S.C. § 1920(1)-(6). "Fees of the . . . marshal" include fees for serving a subpoena. 28 U.S.C. § 1921(a)(1)(B). The fee of a private process server may not exceed fee authorized for the marshal. *E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 624 (11th Cir. 2000). The marshal may charge as much as $65.00 an hour ("or portion thereof") for each item personally served, plus travel costs and other out-of-pocket expenses. 28 C.F.R. § 0.114(a)(3), (4).

Viral DRM seeks $556.50 in costs, which includes $402.00 for the filing fee and $154.50 in process server fees. The process server fee is $77.25 for service on two occasions. Doc. 29-7. The invoice from Gotchha Legal Services, Inc., specifies no travel costs or other out-of-pocket expenses included in this amount. Accordingly, because the amount exceeds the maximum fees of the marshal and contains no other explanation, Viral DRM may recover only $130.00 in process server fees. I recommend reducing the award of costs to $532.00.

III. CONCLUSION

Based on the finding and analysis above, I recommend an order (1) granting in part Viral DRM's motion for default judgment, Doc. 29; (2) awarding Viral DRM statutory damages in the amount of $30,000.00, plus $4,517.00 in reasonable attorney's fees and costs; and (3) directing the Clerk to enter a judgment in the amount of $34,517.00 in favor of the plaintiff and against the defendant, to terminate any pending motion, and to close the case.

REPORTED on this 12th day of December, 2024.

LINDSAY S. GRIFFIN
United States Magistrate Judge

NOTICE TO PARTIES

A party has fourteen days from the day of service of this report either to file written objections to the proposed findings and recommendation or to seek an extension of the fourteen-day deadline. 28 U.S.C. § 636(b)(1)(C). Under Eleventh Circuit Rule 3-1, a party failing to object to a magistrate judge's findings or recommendations "waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1; 28 U.S.C. § 636(b)(1). If the parties wish to expedite the resolution of this matter, they may promptly file a joint notice of no objection.