

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL STOKES,)	Case No. 1:22-cv-973
)	
Plaintiff,)	
)	MAGISTRATE JUDGE
v.)	THOMAS M. PARKER
)	
BRINOR, INC.,)	
<i>doing business as</i>)	<u>MEMORANDUM OPINION</u>
LEATHER STALLION SALOON)	<u>AND ORDER</u>
)	
Defendant.		

This is a copyright-infringement action commenced by plaintiff Michael Stokes against defendant Brinor, Inc. (“Brinor”), which does business as Leather Stallion Saloon (“LSS”), because Brinor displayed on LSS’s Facebook page a flyer containing an altered version of a photograph over which Stokes owns a copyright. The parties have cross-moved for summary judgment on the issues of liability and damages. ECF Doc. 17; ECF Doc. 18.

For the reasons that follow, each motion is GRANTED IN PART and DENIED IN PART.

I. Procedural History

On June 7, 2022, Stokes filed a complaint against Brinor, asserting a single claim of copyright infringement under the Copyright Act, [17 U.S.C. §§ 106, 501](#). ECF Doc. 1. The complaint alleged that Brinor reproduced and displayed a copyrighted photograph, which Stokes authored, on LSS’s Facebook page without license or permission. *See* ECF Doc. 1 at 3, 6–7. As relief, the complaint sought: (i) the greater of either actual or statutory damages; (ii) an

injunction against infringing use of Stokes's "works"; (iii) costs and reasonable attorney fees; and (iv) pre-judgment interest. ECF Doc. 1 at 8.

On August 3, 2022, Brinor filed its answer. ECF Doc. 7. The answer asserted various affirmative defenses, including that Stokes's complaint was time-barred and that a third party was responsible for any damages incurred. *See* ECF Doc. 7 at 3–4. The parties subsequently consented to magistrate judge jurisdiction. ECF Doc. 11.

On March 20, 2023, Stokes filed a motion for summary judgment on the issues of liability and damages, pursuing only statutory damages. ECF Doc. 17. Brinor cross-moved for summary judgment on the same issues, including on the issue of actual damages. ECF Doc. 18. The parties filed opposition briefs to the other's motion, in which Stokes emphasized he "is seeking an award of statutory damages only." ECF Doc. 20; ECF Doc. 21; *see* ECF Doc. 20 at 19. And on May 3, 2023, Stokes filed a reply brief in support of his motion for summary judgment.¹ ECF Doc. 22.

II. Facts and Evidence²

Stokes is a California-based professional photographer. ECF Doc. 17-3 at 1 (declaration of Stokes). His work often features nude and semi-nude models, which he compiles into books. *Id.* at 2–3. Among his works is a September 22, 2014 photograph of model Bryant Wood in baseball paraphernalia:

¹ Stokes's reply brief was filed without leave of court, as required by the Case Management Order. ECF Doc. 13 at 2. Despite the violation, the court has considered Stokes's reply brief in reaching its decision.

² The facts recited in this section are undisputed or established by Rule 56 evidence.

EXHIBIT PHOTOGRAPH 1



ECF Doc. 1-1 (original photograph); ECF Doc. 17-3 at 4. Stokes registered the photograph with the U.S. Copyright Office on September 24, 2014, under Registration No. VAu 1-185-837. ECF Doc. 17-3 at 4; *see* ECF Doc. 17-4 at 2 (certificate of registration).

LSS is an Ohio pub that caters to and supports Cleveland, Ohio's gay community. ECF Doc. 18-2 at 1 (declaration of Kenneth Myers, Jr.); ECF Doc. 18-3 at 1 (declaration of Michael Dominguez). This includes sponsoring local sports teams and hosting special events during the weekend of Pride, an annual celebration of the LGBTQ community. ECF Doc. 18-1 at 1; ECF Doc. 18-2 at 1. And LSS promotes the events it hosts on its Facebook page. ECF Doc. 18-3 at 2.

In 2016, LSS agreed to hold a fundraiser for the benefit of an amateur men's softball team known as the "Cleveland Mustangs" over the weekend of that year's Pride (the 13th and 14th of August) weekend. ECF Doc. 18-2 at 1–2; ECF Doc. 18-3 at 2. David Sulik, a graphic designer, created a flyer to promote the event.³ ECF Doc. 18-2 at 2; ECF Doc. 18-3 at 2. Sulik

³ The sworn declarations submitted by Brinor both assert that Sulik was "asked" to make a flyer promoting the fundraiser without any indication by whom. *See generally* ECF Doc. 18-2; ECF Doc. 18-3.

then sent the flyer to LSS's then-manager, Michael Dominguez, who, on August 9, 2016, published it on LSS's Facebook page:



ECF Doc. 1-2 (Facebook post); ECF Doc. 18-2 at 2; ECF Doc. ECF Doc. 18-3 at 2. LSS's only input in the creation of the flyer was in providing information relevant to the actual fundraiser (i.e., date, time of year, prizes, and the sale of gummy bear shots). ECF Doc. 18-3 at 2.

During the fundraiser, members of the Cleveland Mustangs raised funds by selling gelatin and gummy bear shots. ECF Doc. 18-2 at 3. According to Brinor's owner, Kenneth Myers, Jr.: (i) third-party fundraiser sales equated to a loss in alcohol sales for LSS; (ii) LSS did not "make any funds from the 2016 Cleveland Mustangs fundraiser;" and (iii) LSS "most likely lost money" by allowing the fundraiser. ECF Doc. 18-2 at 2–3. And according to Dominguez, the gross receipts on the Sunday of 2016's Pride weekend (\$2,491.50) were the lowest since 2013 (\$2,588.75). ECF Doc. 18-3 at 2–3.

On March 27, 2022, Stokes came across LSS's Facebook page, and the August 9, 2016 post promoting the fundraiser. ECF Doc. 17-3 at 4–5. Stokes recognized the image of the baseball player on the flyer as the September 2014 photograph of Wood. *Id.* However, Stokes never granted LSS a license or permission to use the photograph. ECF Doc. 17-3 at 5–7.

III. Summary Judgment Standard

Summary judgment is proper when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#). A genuine dispute of fact exists when “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 249](#) (1986). The moving party bears the initial burden of establishing the absence of a genuine dispute of fact, either by pointing to evidence so establishing or by pointing out an absence of evidence to support the nonmovant’s case. [Fed. R. Civ. P. 56\(c\)\(1\)\(A\)-\(B\)](#); *Celotex Corp. v. Catrett*, [477 U.S. 317, 324–25](#) (1986). The burden then shifts to the nonmovant to show that there is a genuine dispute of fact. *Anderson*, [477 U.S. at 248–50](#). To do so, the nonmovant may not rely on his pleadings; he must set forth “specific facts showing that there is a genuine issue for trial.” *Celotex Corp.*, [477 U.S. at 324](#). The relevant question at all times is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, [477 U.S. at 251–52](#).

In determining whether a genuine issue of fact exists, “the evidence is construed, and all reasonable inferences are drawn, in favor of the nonmoving party.” *Burgess v. Fischer*, [735 F.3d 462, 471](#) (6th Cir. 2013). When, as here, both parties have moved for summary judgment, we “must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inference against the party whose motion is under consideration.” *Craig v. Bridges Bros. Trucking LLC*, [823 F.3d 382, 387](#) (6th Cir. 2016). The Sixth Circuit has cautioned that summary judgment, particularly in favor of the defendant, should be “used sparingly” in copyright-infringement cases. *RJ Control Consultants, Inc. v. Multiject, LLC*, [981 F.3d 446, 453](#) (6th Cir. 2020) (internal quotation marks omitted).

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