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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DR. SEUSS ENTERPRISES, L.P., a
California limited partnership,

Plaintiff,

v.

COMICMIX LLC, a Connecticut
limited liability company; MR.
GLENN HAUMAN, an individual;
MR. DAVID JERROLD
FRIEDMAN A/K/A DAVID
GERROLD, an individual; and MR.
TY TEMPLETON, an individual,

Defendants.

Case No.: 16-cv-02779-JLS-BGS

**PLAINTIFF DR. SEUSS
ENTERPRISES, L.P.'S REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN FURTHER
SUPPORT OF ITS RENEWED
MOTION FOR SUMMARY
JUDGMENT**

Date: June 10, 2021
Time: 1:30 pm
Ctrm: 4D
Judge: Hon. Janis L. Sammartino

REPLY MEMO OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF PLAINTIFF'S RENEWED MSJ
USDC CASE NO. 16-CV-02779-JLS-BGS

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1 Plaintiff Dr. Seuss Enterprises, L.P. (“DSE”) respectfully submits this reply
 2 memorandum of law in further support of its renewed motion for summary judgment
 3 on its copyright claim against defendants ComicMix LLC, David Jerrold Friedman,
 4 Glenn Hauman, and Ty Templeton’s (“Defendants”).

5 **I. PRELIMINARY STATEMENT**

6 None of Defendants’ opposition arguments defeats DSE’s renewed motion for
 7 summary judgment on willful copyright infringement. First, Defendants’ cross-
 8 motion, seeking reconsideration of the Court’s May 2018 denial of their motion for
 9 a referral under 17 U.S.C. §411(b), is entirely without merit, as explained in DSE’s
 10 April 30, 2021 brief, ECF No. 178, and it is therefore no barrier to a judgment that
 11 Defendants are liable for willfully infringing the copyrights in *Oh, the Places You’ll*
 12 *Go!* (“Go!”), *The Sneetches and Other Stories* (“Sneetches”), and *How the Grinch*
 13 *Stole Christmas!* (“Grinch”) (collectively, the “DSE Works”).

14 Second, Defendants’ *de minimis* use defense to infringement fails because it
 15 (a) was abandoned by Defendants, who did not raise it in opposing DSE’s initial
 16 summary judgment motion or on appeal, (b) is barred by the mandate rule, since the
 17 Ninth Circuit found that Defendants made extensive use of all three DSE Works, and
 18 (c) otherwise loses on the merits.

19 Third, the undisputed evidence (much of which was cited by the Ninth Circuit)
 20 shows that Defendants’ disregard of DSE’s rights was reckless and that they did not
 21 have a *reasonable* belief that they were making fair use of the DSE works, so the
 22 Court should find that Defendants’ infringement was willful.

23 Fourth, on the amount of statutory damages, Defendants are not innocent
 24 infringers as a matter of law. Even though Defendants were stopped before they were
 25 able to damage DSE’s markets with their infringing book, considerations of
 26 deterrence warrant awards of statutory damages well above the minimum allowed by
 27 law. Finally, DSE agrees with Defendants that a jury must determine the amount of
 28 heightened statutory damages to be awarded to DSE.

II. ARGUMENT

A. Defendants' Section 411(b) Argument Should Not Delay Granting DSE's Summary Judgment Motion

Defendants first contend that the Court should not take up summary judgment, but instead grant Defendants' motion for reconsideration (ECF No. 177), reverse its prior 2018 denial of Defendants' motion under 17 U.S.C. § 411(b)(2) (ECF No. 88), and then refer the validity challenge of the *Go!* and *Sneetches* copyright registrations to the Register of Copyrights for an advisory opinion. However, this argument fails for the reasons detailed in DSE's opposition to the reconsideration motion: Defendants waived further challenges to DSE's copyright ownership by failing to raise a validity issue in opposition to DSE's original summary judgment motion or in a cross-appeal to the Ninth Circuit; and in any event, there has been no change in controlling law regarding motions under §411(b)(2) since the Court denied Defendants' original motion. (ECF No. 178.)

B. Defendants' Abandoned De Minimis Use Defense Conflicts With The Mandate And Fails On The Merits

Defendants next claim that their *de minimis* use affirmative defense must be resolved before the Court determines their liability as to *Sneetches* and *Grinch* (but not *Go!*, conceding substantial copying). (ECF No. 179.) This argument fails for three reasons.

First, *de minimis* use is another affirmative defense that Defendants long ago abandoned and cannot now retrieve. They failed to raise it in opposition to DSE's original summary judgment motion, which argued that Defendants "substantially copied from the DSE Works [including *Sneetches* and *Grinch*] to create *Boldly*." (ECF No. 107 at 13.) They raised only one defense: that *Boldly* made fair use of the DSE Works. (ECF No. 120 at 15-25.) However, "[t]he failure to raise an affirmative defense in opposition to a motion for summary judgment constitutes an abandonment of the defense." *In re Com. Acceptance Corp.*, 5 F.3d 535, 1993 WL 327833 at *4

(9th Cir. 1993) (concurring opinion); *see also JP Morgan Chase Bank v. Las Vegas Dev. Grp., LLC*, 740 F. App'x 153, 154 (9th Cir. 2018); *Kaffaga v. Steinbeck*, 14-cv-8699, 2017 WL 5989039, at *1 (C.D. Cal. Aug. 25, 2017), *aff'd sub nom. Kaffaga v. Est. of Steinbeck*, 938 F.3d 1006 (9th Cir. 2019). Indeed, on summary judgment Defendants conceded that there can be no fair use defense “unless there is substantial use,” which contradicts their present claim of *de minimis* use. (ECF No. 120 at 18.) Defendants’ failure to previously raise *de minimis* use bars them from doing so now.

Second, the Ninth Circuit’s findings that Defendants’ takings of copyrighted material were substantial are incorporated in its mandate and foreclose any argument that Defendants’ infringement of *Sneetches* and *Grinch* was *de minimis*. The Ninth Circuit expressly found that Defendants misappropriated “significant ‘illustrations from *Grinch* and two stories in *Sneetches*’” and “took the heart” of those works along with *Go!*. *Dr. Seuss Enterprises, L.P. v. ComicMix LLC, et al.*, 983 F.3d 443, 456-457 (9th Cir. 2020). The appellate court emphasized that “ComicMix captured the placements and poses of the characters, as well as every red hatch mark arching over the handholding characters in *Grinch*’s iconic finale scene.” *Id.* at 454. The appellate court then detailed Defendants’ substantial copying of *Sneetches*, “down to the exact shape of the sandy hills in the background and the placement of footprints that collide in the middle of the page.” *Id.* at 455. The Opinion further stressed that the machine from *Sneetches* copied by Defendants appears in ten out of twenty-two pages of the original book, and that:

ComicMix took this ‘highly expressive core’ of *Sneetches*. Templeton testified that ‘the machine in the Star-Bellied Sneetches story’ was ‘repurposed to remind you of the transporter’ in Star Trek. Drawing the machine ‘took ... about seven hours’ because Templeton tried to ‘match’ the drawing down to the ‘linework’ of Seuss. He ‘painstakingly attempted’ to make the machines ‘identical.’ In addition to the machine, *Boldly* took ‘the poses that the Sneetches are in’ so that ‘[t]he poses of commander Scott and the Enterprise crew getting into the machine are similar.’ *Boldly* also captured the particular ‘crosshatch’ in how Dr. Seuss rendered the machine, the ‘puffs of

1 smoke coming out of the machine,’ and the ‘entire layout.’
 2 *Id.* at 457-458. These explicit findings explode Defendants’ assertions that their
 3 takings from *Grinch* and *Sneetches* were “not particularly significant.” (ECF No.
 4 179 at 7.) Because the Ninth Circuit’s findings of substantial use are an essential part
 5 of its ruling on fair use, the “spirit of the mandate” is a second bar to Defendants’
 6 already-abandoned *de minimis* defense. *United States v. Montgomery*, 462 F.3d
 7 1067, 1072 (9th Cir. 2006) (district courts “must implement both the letter and the
 8 spirit of the mandate, taking into account the appellate court’s opinion and the
 9 circumstances it embraces.”)

10 Third, even if the Court nonetheless were to reach the issue, Defendants’ *de*
 11 *minimis* use defense lacks any merit. “[A] use is *de minimis* only if the average
 12 audience would not recognize the appropriation.” *Newton v. Diamond*, 388 F.3d
 13 1189, 1193 (9th Cir. 2004) (citing *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir.
 14 1986) (“[A] taking is considered *de minimis* only if it is so meager and fragmentary
 15 that the average audience would not recognize the appropriation.”)). Defendants’
 16 argument in support of this defense contradicts their earlier position on fair use,
 17 which is that they had to take extensively from the DSE Works because *Boldly* was
 18 a mash-up (or a parody or a satire, depending on which label Defendants preferred at
 19 various stages of the case). (ECF No. 120 at 18.) An average viewer undoubtedly
 20 would recognize the appropriation. The evidence of substantial taking is jarringly
 21 recognizable, just as the Ninth Circuit highlighted when it included a number of
 22 comparison images from *Sneetches* and *Grinch* in its opinion:





Dr. Seuss Enterprises, L.P., 983 F.3d at 454-455, 457-458. As the Ninth Circuit in *Fisher* explained when it “reject[ed] out of hand” a *de minimis* use defense raised by another self-proclaimed parodist:

Here, the appropriation would be recognized instantly by anyone familiar with the original. As an analytical matter, moreover, it would seem contradictory to assert that copying for parodic purposes could be *de minimis*. A parody is successful only if the audience makes the connection between the original and its comic version. To ‘conjure up’ the original work in the audience’s mind, the parodist must appropriate a substantial enough portion of it to evoke recognition.

Fisher, 794 F.2d at 434.

The fact that *Boldly* “does not copy any text” from *Sneetches* or *Grinch* (ECF No. 179 at 6) is meaningless: copyright also protects the illustrations in the DSE Works and copying them to the extent Defendants did is plain infringement. Defendants fare no better with the “estoppel” variation on their *de minimis* claim, which appears to be based on the Section 411 Order. The issue on Defendants’ 411 motion was whether a substantial part of *Sneetches* and *Go!* was published in other

media before the applications to register those works were filed. This has nothing in common with their *de minimis* defense, which addresses whether *Boldly* copied only an insubstantial portion of the DSE Works. The illustrations from the *Sneetches* book that Defendants copied in *Boldly* were not previously published in *Redbook* and thus not even the subject of the Section 411 motion. (ECF No. 69 at 4.) Moreover, Defendants copied “14 of *Go!*’s 24 pages, close to 60% of the book,” 983 F.3d at 456, not just the one illustration in *Go!* that was based on the background art in Dr. Seuss’s New York Times op-ed poem. (*Id.* at 4.) Those takings are massive, not *de minimis*. Moreover, as the Ninth Circuit found, Defendants misappropriated the “heart” of all of the DSE works, 983 F.3d at 457, and such a finding precludes a holding of *de minimis* use. *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980), *aff’d*, 623 F.2d 252 (2d Cir. 1980). Defendants’ final argument – that their copying of *Sneetches* and *Grinch* is *de minimis* because the images taken from those works do not “drive any purchasing decisions” – has no merit. The “effect on the market” is relevant only to fair use, which is no longer in the case, and, indeed, the passage that Defendants rely upon from *Hustler Mag. v. Moral Majority, Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986), appears in the Ninth Circuit’s discussion of the fourth fair use factor. (ECF No. 179 at 8.)

C. Defendants Willfully Infringed the DSE Works.

Defendants initially claim that their infringement was innocent, but 17 U.S.C. § 401(d) precludes this argument because all three of the DSE Works carried clear notices of copyright. *Plan P2 Promotions, LLC v. Wright Bros., Inc.*, No. 16-cv-2795, 2017 WL 1838943, at *9 (S.D. Cal. May 8, 2017) (Sammartino, J.).

To support their assertions of non-willful infringement, Defendants next claim that they had a good-faith belief that *Boldly* was a fair use. (ECF No. 179 at 10.) As DSE detailed in its opening brief, all of the evidence shows Defendants’ repeated clear knowledge of a substantial risk that their actions were not fair use, and an eager willingness to make *Boldly* more salable by increasing their slavish copying from the

1 DSE Works. (ECF No. 175-1 at 9-15.) Defendants look for support in the following
 2 facts (ECF No. 179 at 11-15), but those facts only highlight their reckless conduct:

- 3 • Hauman’s comment “If we’re parodying TWO things (Pat the Bunny and Trek)
 4 we’re on safer ground” is followed with “*I think.*” (ECF No. 179 at 11) (emphasis
 5 added.) Yet (1) Hauman never confirmed his uninformed speculation that stealing
 6 from two works is somehow less actionable than stealing from only one source,
 7 and (2) “safer ground” does not mean Hauman believed that *Boldly* was non-
 8 actionable;
- 9 • Hauman noted that he was “slightly concerned” about infringing DSE’s rights and
 10 made a point of caveating that he was not a lawyer in rendering his opinion that
 11 *Boldly* was “well protected by parody.” Again, this communication demonstrates
 12 that Hauman knew or had reason to believe that Defendants’ conduct was
 13 infringing but recklessly disregarded that knowledge, and both this Court and the
 14 Ninth Circuit easily dispatched the notion that *Boldly* was parodic. *Dr. Seuss*
 15 *Enterprises, L.P.*, 983 F.3d at 452-453 (“*Boldly* is not a parody. ComicMix does
 16 not seriously contend that *Boldly* critiques or comments on *Go!*.”); (ECF No. 38
 17 at 7-8);
- 18 • Hauman’s admission that he had read *Dr. Seuss Enters., L.P. v. Penguin Books*
 19 *USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997) before starting to copy undermines
 20 Defendants’ current assertion that they had a “well-founded” belief that they were
 21 engaging in fair use and could proceed without talking to a lawyer. The Ninth
 22 Circuit ruling in this case pointed out the close proximity of the facts and law to
 23 the *Penguin Books* decision.¹ *Dr. Seuss Enterprises, L.P.*, 983 F.3d at 452-453,
 24

25 ¹ The defendants in *Schiffer Publ’g, Ltd. v. Chron. Books, LLC*, 03-cv-44444962,
 26 2005 WL 1244923 (E.D. Pa. May 24, 2005), cited by Defendants (ECF No. 179 at
 27 10-11), were relying on a non-precedential district court decision, while Defendants
 28 here were *ignoring* binding Circuit precedent. Moreover, while *Schiffer* found the
 fair use case there to be “close,” *Id.* at *5, the Ninth Circuit here found the opposite
 concluding that “all of the statutory [fair use] factors decisively weigh against
ComicMix.” *Dr. Seuss Enterprises, L.P.*, 983 F.3d at 451 (int. citations omitted).

1 457);

- 2 • Hauman’s claim to ThinkGeek, a prospective business partner, that *Boldly* was
- 3 “straight up parody” does not reflect a well-founded belief that *Boldly* was not an
- 4 infringement, *particularly* given the fact that the comment was in response to the
- 5 question “it goes without saying you’ve got the license though right” followed by
- 6 Hauman’s acknowledgement that not having a license could “complicate matters”
- 7 (ECF No. 175-1 at 12); and
- 8 • Defendants’ self-serving statements that they “firmly believe” *Boldly* is a parody
- 9 but that courts may disagree does not demonstrate a “well-founded” belief, but a
- 10 reckless decision to proceed with slavish copying in the face of a serious risk that
- 11 they would lose if sued for infringement. (ECF No. 175-1 at 10-11.)

12 Defendants’ other arguments also fall flat. There was no issue of first

13 impression here. The Ninth Circuit has long ruled on issues of fair use and noted that

14 the question was not “whether mash-ups can be fair use” but rather whether *Boldly*

15 was a fair use. *Dr. Seuss Enterprises, L.P.*, 983 F.3d at 452. The court found it

16 “definitively” was not. *Id.* Similarly, no “unsettled questions of law” were raised

17 here: the Ninth Circuit found that Defendants’ arguments were almost identical to

18 those it rejected in *Penguin Books* – which Hauman, of course, had read before

19 embarking on infringement. *Id.* (“We considered and rejected this very claim in an

20 appeal involving another well-known book by Dr. Seuss—The Cat in the Hat.”)

21 Defendants’ refusal to seek legal counsel, despite knowledge of the risks in

22 proceeding, is highly probative of willfulness, and in any event does not stand alone:

23 it is only one of many indications of willful conduct. *Cf.* ECF No. 179 at 14.

24 Defendants pressed forward even after being repeatedly asked by potential

25 commercial partners if they had a license from DSE and even proclaimed that a court

26 may reject their wishful thinking about fair use. (ECF No. 175-1 at 11-12.) In fact,

27 the Ninth Circuit *expressly* noted that Defendants’ failure to “consult a lawyer” or

28 pursue a license “led to this lawsuit.” *Dr. Seuss Enterprises, L.P.*, 983 F.3d at 450.

1 *Twentieth Century Fox Film Corp. v. Dastar Corp.*, No. 97-cv-7189, 2000 WL
 2 35503106, at *10 (C.D. Cal. Aug. 29, 2000), cited by Defendants, found willful
 3 infringement where “Defendants also did not consult with a lawyer to determine
 4 whether the release of Campaigns would infringe anyone’s rights.” *Id.* *Henley v.*
 5 *Devore*, 733 F. Supp. 2d 1144, 1166 (C.D. Cal. 2010) does not help them; it states
 6 that while failing to seek counsel is not willful infringement “as a matter of law,” that
 7 failure is “probative of recklessness.” Defendants did not show good faith by
 8 “pledg[ing]” to refrain from publishing *Boldly*: by the time of the “pledge,” they were
 9 neck-deep in infringement, Kickstarter had frozen their funding, and their publisher
 10 had abandoned them. The “pledge” was nothing but a belated concession to the
 11 reality that by then they could not publish.

12 The proof that Defendants’ conduct was recklessly willful, and that they lacked
 13 a reasonable basis for believing that their copying was fair use, is overwhelming. *See*
 14 *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (“To
 15 refute evidence of willful infringement, Pausa must not only establish its good faith
 16 belief in the innocence of its conduct, it must also show that it was reasonable in
 17 holding such a belief.”). Accordingly, this Court should find that Defendants
 18 willfully infringed DSE’s copyrights.

19 **D. DSE Should Be Awarded Heightened Statutory Damages But**
 20 **Agrees To Proceed To A Jury Trial For The Calculation Of The**
 21 **Award.**

22 In its opening brief DSE asked this Court to enter a total statutory damages
 23 award of \$225,000, which amounts to \$75,000 per each of DSE’s three infringed
 24 works. (ECF No. 175-1 at 20.) This amount, which is half of the maximum available
 25 for willful infringement of three works, hardly “shocks the conscience,” as
 26 Defendants assert. (ECF No. 179 at 16.) Defendants willfully infringed three
 27 immensely valuable copyrights *for profit*, intending to compete with DSE in the book
 28 market while actively exploring their next Seuss appropriation. They did not publish
Boldly only because responsible commercial parties, such as the publisher Andrews

McMeel, prudently abandoned the project when they realized the risk. (ECF No. 175-1 at 12). Given the willfulness of Defendants' conduct, the value of the copyrights, and the need for a conspicuous deterrent to future infringers, the amount that DSE asks for in statutory damages is nowhere near a "windfall" as Defendants claim. (ECF No. 179 at 16.) *See, e.g., Three Lakes Design v. Savala*, No. 17-cv-01757, 2019 WL 1979918, at *5 (E.D. Cal. May 3, 2019), *report and recommendation adopted*, 2019 WL 3564051 (E.D. Cal. Aug. 6, 2019); *see also Microsoft Corp. v. Nop*, 549 F. Supp. 2d 1233, 1237 (E.D. Cal. 2008).²

Finally, DSE agrees that there is authority for a jury trial on damages alone if statutory damages above the minimum allowed by law are awarded. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998).

III. CONCLUSION

DSE thus asks this Court to grant DSE's renewed motion for summary judgment, enter judgment for DSE on its copyright infringement claim, permanently enjoin Defendants and those acting in concert with Defendants from further infringement of DSE's copyrights, determine that Defendants' infringement was willful, and schedule a jury trial on the amount of statutory damages to be awarded to DSE.

Dated: May 14, 2021

DLA PIPER LLP (US)

/s/ Tamar Duvdevani

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Dr. Seuss Enterprises, L.P.

² *Mon Cheri Bridals, LLC v. Cloudflare, Inc.*, 19-cv-1356, 2021 WL 1222492 (N.D. Cal. Apr. 1, 2021) does not hold, as Defendants suggest, that a lack of profits limits the award of statutory damages. (Cf. ECF No. 179 at 17.) *Mon Cheri* was a discovery dispute about whether the plaintiff was required to disclose profit information because it might elect statutory damages at judgment. *Id.* at *1. The court noted that lost profits is only one of seven factors bearing on the amount of statutory damages to be awarded, and the plaintiff's profits were discoverable to permit the defendant to argue against a large award of statutory damages, but did not hold that a plaintiff who does not lose profits may only recover the statutory minimum damages. *Id.* at *2-3. -10-