

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Todd Atkinson,

Plaintiff,

v.

Chan Shepherd,

Defendant.

Case No. 0:24-cv-1545-SAL

ORDER

In 1982, Plaintiff Todd Atkinson was commissioned to paint a mural titled *Water Tank* on a building in Clover, South Carolina. Sometime later, Defendant Chan Shepherd painted over *Water Tank*, substantially replicating the mural but replacing Atkinson's name with his own. *See* ECF No. 57 at 1–2. Atkinson discovered this in 2023 and soon after brought this lawsuit alleging, among other claims, direct copyright infringement and violations of the Visual Artists Rights Act (“VARA”). Shepherd has never appeared in this case. This court previously granted Atkinson's motion for default judgment against Shepherd. But at that time, Atkinson had not specified what damages he sought. *See id.* at 13. He has done so now. [ECF No. 62.]

Rather than restate the relevant facts, law, and conclusions from its prior order, the court incorporates that order by reference. [ECF No. 57.] In that order, the court deemed Shepherd liable for copyright infringement and violating VARA. The court now considers what relief is appropriate.

LEGAL STANDARD

When a defendant fails to appear in a case, the clerk may enter default. But if the plaintiff is not seeking a sum certain from the defaulting defendant, the plaintiff must apply to the court for a default judgment. Fed. R. Civ. P. 55(b)(2). A court retains broad discretion in ruling on default

and may: (1) conduct an accounting, (2) determine damages, (3) establish the truth of allegations by evidence, or (4) investigate any other relevant matter. *See id.*; *see also United States v. Ragin*, 113 F.3d 1233 (4th Cir. 1997).

For purposes of default judgment, the court accepts a plaintiff's well-pleaded factual allegations as true but does not accept legal conclusions. *DIRECTV, Inc. v. Rawlins*, 523 F.3d 318, 322 n.2 (4th Cir. 2008); *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780 (4th Cir. 2001) (citing *Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)).

DISCUSSION

I. Actual Damages for Federal Copyright Infringement

Having already found that Shepherd infringed Atkinson's copyright, the court now considers the appropriate measure of damages. *See* ECF No. 57 at 3–5. Atkinson seeks actual damages and profits, not statutory damages.¹ *See* ECF No. 62 at 8. Under 17 U.S.C. § 504, a copyright owner may recover actual damages he suffered as a result of the infringement, as well as any profits of the infringer attributable to the infringement. Usually, to aid the court in determining the correct figure for actual damages and profits, “the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his . . . deductible expenses and the elements of profit attributable to factors other than the copyrighted work.” 17 U.S.C. § 504(b). But because Shepherd has failed to appear, this normal back-and-forth between plaintiff and defendant is impossible. Nevertheless, the Fourth Circuit has recognized that “the term ‘actual damages’ is ‘broadly construed to favor victims of infringement.’” *Dash v.*

¹ Atkinson admits he is not entitled to statutory damages “where, as here, the infringement of a published work commenced before registration where registration occurred more than three months after publication of the work.” [ECF No. 62 at 8.]

Mayweather, 731 F.3d 303, 312 (4th Cir. 2013) (quoting *On Davis v. The Gap, Inc.*, 246 F.3d 152, 164 (2d Cir. 2001)).

As proof of his actual damages, Atkinson offers an appraisal by Kaitlyn Marley, a professional appraiser of fine art, who opines that the retail replacement value of *Water Tank* is \$8,400. *See* ECF No. 62-1. The court finds this assessment to be an appropriate measure of actual damages and profits, particularly where Shepherd has not appeared to offer his own proof. *See McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566 (7th Cir. 2003) (“Actual damages are usually determined by the loss in the fair market value of the copyright, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer.”). Accordingly, the court awards Atkinson **\$8,400** in actual damages for Shepherd’s copyright infringement.

II. Statutory Damages for VARA Violation

In addition to actual damages for copyright infringement, Atkinson requests \$150,000 in statutory damages for Shepherd’s violation of VARA. [ECF No. 62 at 15–16.]

The court notes that an award of damages for copyright infringement does not preclude a separate award for a violation of VARA. Damages for copyright infringement go to the copyright owner, who is not necessarily the artist as copyrights are transferable. In contrast, VARA was enacted to protect artists’ moral rights of integrity and attribution. *Canilao v. City Com. Investments, LLC*, 613 F. Supp. 3d 1236, 1244 (N.D. Cal. 2022). These rights can be waived but cannot be transferred. *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995). Although VARA incorporates the remedies available under copyright law, there is no registration prerequisite to seeking statutory damages for VARA violations. *Id.* Under 17 U.S.C. § 504(c), the

statutory damages range from \$750 to \$30,000 per work or up to \$150,000 where the violation was committed willfully. 17 U.S.C. § 504(c)(1) and (2).

Atkinson makes a compelling argument that Shepherd's conduct was willful. *See* ECF No. 62 at 13–14. In particular, Shepherd, also an artist, “painted a nearly identical version of the mural over *Water Tank*, replacing Atkinson's name with Shepherd's and effectively ‘obliterating’ **Atkinson's name and copyright**.” *Id.* at 14 (quoting ECF No. 57 at 1) (emphasis by Plaintiff). Atkinson argues that, at a minimum, Shepherd had constructive notice of Atkinson's copyright. *Id.* His willfulness also could be inferred from his failure to appear and defend here. *Id.* at 13 (citing *Michael Grecco Productions, Inc. v. New York Perf. Arts Acad., Inc.*, No. 1:23-CV-08120-ER, 2025 WL 370831, at *4 (S.D.N.Y. Feb. 2, 2025) (quoting *Original Appalachian v. Yuil Int'l Corp.*, 5 U.S.P.Q.2d (BNA) 1516, 1524 (S.D.N.Y. 1987))). The court concludes Shepherd's conduct was willful based on the facts presented by Atkinson, which the court accepts as true. This conclusion triggers enhanced penalties under VARA.

Atkinson requests \$150,000, the maximum statutory penalty available. He argues that a significant statutory damages award is necessary to compensate him but also to deter willful violations, a critical goal of VARA. [ECF No. 62 at 15–16.] Atkinson argues the “case calls for strong deterrence of willful abuses of the VARA” as Shepherd “willfully destroyed a work of art authored by a fellow artist” and then “did not deign to appear and defend himself” in this action. *Id.* at 16. The court agrees. And the requested enhancement falls within the range upheld by courts in similar cases. *See id.* at 15 (citing *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 447 (E.D.N.Y. 2018) (finding “the maximum award of statutory damages” warranted under VARA and awarding a total of \$6,750,000 in damages, consisting of \$150,000 for each work of art), *affirmed by Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020)). *Cf. Martin v. City of*

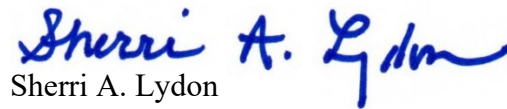
Indianapolis, 192 F.3d 608, 614 (7th Cir. 1999) (finding that the plaintiff was not entitled to enhanced damages in what “appear[ed] to be a case of bureaucratic failure within the City government, not a willful violation of plaintiff’s VARA rights”). Accordingly, the court awards Atkinson **\$150,000** in enhanced damages under § 504(c).

CONCLUSION

Based on the above analysis, the court awards Atkinson damages of **\$158,400** for Shepherd’s copyright infringement and violation of VARA. The Clerk is directed to enter a judgment and close this case.

IT IS SO ORDERED.

January 6, 2026
Columbia, South Carolina


Sherri A. Lydon
United States District Judge