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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WARNER BROS. RECORDS INC., ET AL.,

No. C-06-04913 JSW (JCS)

Plaintiffs,

v.

GREG PINHEIRO,

Defendant.

**REPORT AND RECOMMENDATION
RE MOTION FOR ENTRY OF DEFAULT
JUDGMENT BY THE COURT
[Docket No. 12]**

I. INTRODUCTION

Plaintiffs, Warner Bros. Records Inc., UMG Recordings, Inc., Virgin Records America, Inc., Elektra Entertainment Group Inc., and Atlantic Recording Corporation, bring a Motion for Entry of Default Judgment by the Court (the “Motion”) in this copyright infringement action. Plaintiffs seek \$8,250 in statutory damages, \$420 in costs, and a permanent injunction. A hearing was held on Friday, June 8, 2007. Plaintiffs filed supplemental materials on June 11, 2007. Having considered Plaintiffs’ Motion, the accompanying submissions, and all other evidence of record, the Court recommends that the Motion be GRANTED.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are recording companies bringing suit against Defendant under the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.* (“Copyright Act”), for infringement of Plaintiffs’ copyrighted sound recordings. Compl. ¶ 11. Plaintiffs allege that the Copyright Act grants each Plaintiff exclusive rights to reproduce and distribute to the public their respective copyrighted recordings (“Copyrighted Recordings”). Compl. ¶ 12. The Copyrighted Recordings at issue in this case include eleven specified recordings listed in Exhibit A of the Complaint as well as certain recordings

1 listed in Exhibit B of the Complaint.¹ Compl. ¶ 11 & Exs. A-B. Plaintiffs allege that they are, and
 2 at all relevant times have been, the copyright owners or licensees of exclusive rights under United
 3 States copyright with respect to the Copyrighted Recordings. Compl. ¶ 11. Plaintiffs allege that
 4 each of the Copyrighted Recordings is the subject of a valid Certificate of Copyright Registration
 5 issued by the Register of Copyrights.² *Id.*

6 Plaintiffs claim that Mr. Pinheiro violated their copyrights by using, and continuing to use,
 7 an online media distribution system to download copyrighted recordings, to distribute them to the
 8 public, and/or make them available for distribution to others. Compl. ¶ 12; Kerr Decl. ¶ 3. Plaintiffs
 9 submitted a declaration detailing how they discovered the copyright violations committed by Mr.
 10 Pinheiro. *See* Kerr Decl. ¶¶ 3-7. Specifically, in January 2005, Plaintiffs' investigator detected an
 11 individual using the KaZaA online media distribution system over a peer-to-peer file-sharing
 12 network. Kerr Decl. ¶ 3. The individual had 553 music files on his computer and was distributing
 13 the files to others through the peer-to-peer network. *Id.* Through serving a subpoena on Pacific Bell
 14 Internet Services, the Internet Service Provider associated with the IP address, Plaintiffs identified
 15 Mr. Pinheiro as the user of the IP address committing the acts of copyright infringement. Kerr Decl.

16
 17 ¹ The eleven Copyrighted Recordings listed in Exhibit A of the Complaint are:

- 18 • “Go Your Own Way,” on album “Rumours,” by artist “Fleetwood Mac” (SR# N39857);
- 19 • “Buffalo Springfield Again,” on album “Silver & Gold,” by artist “Neil Young” (SR#
- 20 279-970);
- 21 • “I’d Die for You,” on album “Slippery When Wet,” by artist “Bon Jovi” (SR# 71-794);
- 22 • “My Favorite Mistake,” on album “The Globe Sessions,” by artist “Sheryl Crow” (SR#
- 23 279-383);
- 24 • “Roll With It,” on album “Roll With It” by artist “Steve Winwood” (SR# 93-680);
- 25 • “Get Real Paid,” on album “Midnite Vultures,” by artist “Beck” (SR# 276-479);
- 26 • “In the End,” on album “Dookie,” by artist “Green Day” (SR# 185-457);
- 27 • “Gimme All Your Lovin’,” on album “Eliminator,” by artist “ZZ Top” (SR# 45-132);
- 28 • “In Between Days,” on album “The Head on the Door,” by artist “The Cure” (SR# 65-
- 872)
- “Waiting For A Girl Like You,” on album “Foreigner 4,” by artist “Foreigner” (SR# 27-
- 769); and
- “Jackass,” on album “Warning,” by artist “Green Day” (SR# 288-352).

26 Compl. ¶ 5 & Ex. A. The Copyrighted Recordings also include “certain of the sound recordings listed
 27 on Exhibit B,” which is a list of recordings on *KaZaA*, an online media distribution system, under the
 28 username “gpinheiro@KaZaA.” Compl. ¶ 5 & Ex. B.

² Following the June 8th hearing, Plaintiffs provided copies of the copyright registrations of the
 eleven sound recordings listed in Exhibit A. *See* Supp. Kerr Decl. Exs. A-K.

¶¶ 5-7. Plaintiffs then determined Defendant's current address by searching SmartLinx Person Summary Report through Lexis Nexis. Kerr Decl. ¶ 15. The address listed in the SmartLinx report is 115 S. Park Way, Santa Cruz, California 95062, and is where Plaintiffs subsequently served Mr. Pinheiro with the Summons and Complaint. Kerr Decl., Ex. 5; Docket No. 6.

Plaintiffs filed this copyright infringement action on August 15, 2006. Docket No. 1; Kerr Decl. ¶ 9, Ex. 1. The Summons and Complaint were served on Mr. Pinheiro on September 9, 2006 in Santa Cruz, California by substituted service on Marilou Pinheiro, a co-occupant of the residence. Docket No. 6; Kerr Decl. ¶ 10. Defendant failed to answer or otherwise respond to the Complaint and Plaintiffs moved for entry of default. Docket No. 7; Kerr Decl. ¶¶ 11-13. On October 31, 2006, the Clerk of this Court entered default against Defendant. Docket No. 8; Kerr Decl. ¶ 13, Ex. 4. On March 16, 2003, Plaintiffs filed this Motion seeking entry of default judgment and the following relief: 1) \$8,250, constituting the minimum statutory amount of \$750 for each of the eleven instances of infringement alleged in Exhibit A of the Complaint; 2) \$420 in costs pursuant to Section 505 of the Copyright Act; and 3) a permanent injunction pursuant to Section 502 of the Copyright Act. Mot. at 1. Plaintiffs do not seek an award of attorneys' fees in the Motion.³ On March 19, 2007, Judge White referred Plaintiffs' Motion to the undersigned magistrate judge for Report and Recommendation. *See* Docket No. 16.

III. ANALYSIS

A. Service of Process

The Court must "assess the adequacy of the service of process on the party against whom default is requested." *Board of Trustees of the N. Cal. Sheet Metal Workers v. Peters*, No. C-00-395 VRW, 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2, 2001); *accord Hartford Fire Ins. Co. v. Cameron*, No. 05-4818 SC, 2006 WL 3646941, at *1 (N.D. Cal. Dec. 12, 2006). In this case, Plaintiffs served the Summons and Complaint on Mr. Pinheiro by substituted service on Marilou Pinheiro, a co-occupant at the Santa Cruz address that was determined to be the residence of Mr. Pinheiro. *See* Docket No. 6; Kerr Decl. ¶ 10. Service by such means complies with the

³ In the Complaint, Plaintiffs requested "reasonable attorneys' fees incurred herein." Compl. ¶ 17. However, in the Motion, Plaintiffs explicitly forego this request. Mot. at 5 n.2.

1 requirements of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4(e)(2) (allowing for
2 service on an individual by leaving copies of the summons and complaint “at the individual’s
3 dwelling house. . . with some person of suitable age and discretion then residing therein. . .”).
4 Accordingly, the Court concludes that service of process on Defendant was adequate.

5 **B. Legal Standard for Awarding Default Judgment**

6 Pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, the court may enter a
7 default judgment where the clerk, under Rule 55(a), has previously entered the defendant’s default
8 based upon a failure to plead or otherwise defend an action. Fed. R. Civ. P. 55; *see PepsiCo, Inc. v.*
9 *Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002). The Court, however, may not enter a
10 default judgment against an infant or incompetent person unless they are represented in the action by
11 a guardian or other such representative. Fed. R. Civ. P. 55(b)(2). Default judgment also cannot be
12 entered against an individual in military service until after the court appoints an attorney to represent
13 the defendant. *See* 50 U.S.C. App. § 521. Here, Plaintiffs have provided sufficient evidence
14 demonstrating that Mr. Pinheiro is not an infant, incompetent person, nor a person in the armed
15 services. *See* Kerr Decl. ¶¶ 15-16 & Exs. 5, 6. The Court, therefore, may consider entering default
16 judgment against Defendant.

17 Entry of default against a defendant does not automatically entitle a plaintiff to a court-
18 ordered default judgment. *See Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986) (affirming
19 the district court’s denial of default judgment despite the defendant’s alleged failure to answer the
20 complaint). The decision to grant or deny a motion for default judgment is at the discretion of the
21 district court. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In deciding whether to
22 enter a default judgment, a federal court may consider the following “*Eitel*” factors:

- (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

27 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). “In applying this discretionary standard,
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1 default judgments are more often granted than denied.” *PepsiCo v. Triunfo-Mex, Inc.*, F.R.D. 431,
2 432 (C.D. Cal. 1999).

3 Upon an entry of default, the factual allegations of the plaintiff’s complaint are assumed to
4 be true, except those relating to damages. *See Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th
5 Cir. 1977); *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). *See also* Fed. R.
6 Civ. P. 8(d) (“Averments in a pleading to which a responsive pleading is required, other than those
7 as to the amount of damage, are admitted when not denied in the responsive pleading.”). A
8 defendant, however, is not held to admit facts that are not “well-pleaded” or to admit conclusions of
9 law. *Nishmatsu Constr. Co. v. Houston Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). As a
10 result, when the allegations in the complaint are not well-pleaded, liability does not attach by virtue
11 of the defendant’s default and the court should refrain from entering default judgment. *Id.* Relief
12 accompanying a default judgment is further constrained by the remedies sought in the complaint.
13 *See* Fed. R. Civ. P. 54(c) (“A judgment by default shall not be different in kind from or exceed in
14 amount that prayed for in the [complaint.]”); *Cal. Sec. Cans*, 238 F. Supp. 2d at 1175.

15 **C. Application of the Eitel Factors**

16 After assessing the *Eitel* factors, the Court finds that they weigh in favor of granting
17 Plaintiffs’ Motion. Accordingly, the Court recommends that Plaintiffs’ Motion be granted.

18 **1. Prejudice to Plaintiffs**

19 With respect to the first *Eitel* factor, the Court concludes that Plaintiffs will be significantly
20 prejudiced if a default judgment is not entered in their favor. Without an entry of default judgment,
21 Plaintiffs would be denied the right to judicial resolution of their claims and would likely be
22 “without other recourse for recovery.” *Cal. Sec. Cans*, 238 F. Supp. 2d at 177. Absent entry of
23 default judgment, Plaintiffs also could not receive injunctive relief and Defendant’s infringement
24 could continue. *See Capitol Records v. Barrera*, No. C 06-07212 JSW, 2007 WL 1113949, at *2
25 (N.D. Cal. Apr. 13, 2007). As Defendant allegedly continues to engage in acts of infringement
26 (Compl. ¶ 13), Plaintiffs would suffer substantial prejudice if the Court declined to enter a default
27 judgment.

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2. Sufficiency of the Complaint and the Merits of Plaintiffs’ Substantive Claims

Plaintiffs have adequately stated and supported their claim of copyright infringement. Section 106 of the Copyright Act provides that “the owner of [a] copyright . . . has exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . .” 17 U.S.C. § 106. The statute entitles the “legal or beneficial owner of an exclusive right under a copyright. . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b).

A prima facie case of direct copyright infringement requires that a plaintiff establish: (1) ownership of the allegedly infringed material; and (2) that the alleged infringer violated at least one exclusive right granted to the copyright holders under 17 U.S.C. § 106. *See Marder v. Lopez*, 450 F.3d 445, 453 (9th Cir. 2006); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001); *Barrera*, 2007 WL 1113949, at *3. Plaintiffs here have satisfied both elements of a copyright claim. They have established that they own the copyright registrations for the eleven Sound Recordings listed in Exhibit A of the Complaint. *See* Supp. Kerr Decl. Exs. A-K. Plaintiffs also have demonstrated that Mr. Pinheiro used an online media distribution system to download the Copyrighted Recordings and distribute them to the public or make them available for distribution to others. *See* Kerr Decl. ¶¶ 3-7; Compl. ¶ 13. The allegations and evidence are therefore sufficient to support a claim for copyright infringement.

3. The Sum of Money at Stake

The sum of money at issue in this action is not disproportionate or unreasonable. *See Barrera*, 2007 WL 1113949, at *3. Plaintiffs seek to recover the minimum amount of statutory damages for each of the eleven alleged instances of infringement under 17 U.S.C. § 504(c) and costs incurred in bringing suit pursuant to 17 U.S.C. § 505. Mot. at 8, 13; 17 U.S.C. §§ 504(c), 505. While the Copyright Act allows for an award of attorneys’ fees, Plaintiffs are only seeking to

1 recover costs. *See* 17 U.S.C. § 505. As Plaintiffs request only the minimum amount of statutory
2 damages and costs, this factor weighs in favor of granting default judgment.

3 **4. The Possibility of a Dispute of Material Facts**

4 There is no apparent dispute concerning the material facts of this case. Defendant has failed
5 to respond to the Complaint, and because default has been entered, all well-pleaded allegations in
6 the complaint, except those relating to damages, are assumed to be true. *See Discovery Commc'ns,*
7 *Inc. v. Animal Planet, Inc.*, 172 F. Supp. 2d 1282, 1288 (C.D. Cal. 2001). Furthermore, as noted
8 above, Plaintiffs sufficiently alleged and supported the elements of a copyright infringement claim
9 with evidence of both copyright ownership and acts of infringement.

10 **5. Whether Default was Due to Excusable Neglect**

11 There is also no evidence in the record to suggest that default resulted from Defendant's
12 excusable neglect. Upon discovering Mr. Pinheiro's identity, Plaintiffs' counsel sent Mr. Pinheiro a
13 letter notifying him that copyright infringement had been detected and advising him to contact
14 Plaintiffs' representatives to resolve the matter before the initiation of litigation. Kerr Decl. ¶ 8.
15 Defendant contacted Plaintiffs' settlement representatives but the parties were unable to reach an
16 agreement. Kerr Decl. ¶ 9. As discussed above, Plaintiffs properly served Defendant with the
17 Summons and Complaint on September 9, 2006, by substitute service. *See* Docket No. 6; Kerr Decl.
18 ¶ 10. Plaintiffs also sent Defendant a letter on October 4, 2006, notifying him that he was in default
19 and urging Defendant to respond to the Complaint or to contact Plaintiffs' representatives. Kerr
20 Decl ¶ 12, Ex. 2. Defendant was also notified on December 27, 2006, that the Clerk of this Court
21 had entered default against him. Kerr Decl. ¶ 14, Ex. 4. Despite service and notification, Defendant
22 has not responded to Plaintiffs' Complaint or otherwise made an appearance before this Court.
23 Accordingly, the Court finds that the default did not result from excusable neglect.

24 **6. Policy Favoring Decisions on the Merits**

25 The federal courts prefer to decide cases on their merits when "reasonably possible." *Eitel,*
26 *728 F.2d at 1472.* This preference, however, is not dispositive. *See Klopping v. Fireman's Fund,*
27 *No. C 94-2684, 1996 U.S. Dist. LEXIS 1786, at *10 (N.D. Cal. Feb. 13 1996).* When a defendant
28 fails to answer a plaintiff's complaint, a decision on the merits is "impractical, if not impossible."

1 *Cal. Sec. Cans*, 238 F. Supp. at 1177. Therefore, “the preference to decide cases on the merits does
2 not preclude a court from granting default judgment.” *Kloeping*, 1996 U.S. Dist. LEXIS 1786, at
3 *10. The Court, therefore, may enter default judgment against Defendant.

4 **D. Relief Sought**

5 Pursuant to Rule 54(c) of the Federal Rules of Civil Procedure, the relief requested in a
6 motion for entry of default judgment may not exceed the remedies sought in the complaint. Fed. R.
7 Civ. P. 54(c). Plaintiffs originally sought statutory damages for each infringement of each
8 Copyrighted Recording, costs, reasonable attorneys’ fees, and permanent injunctive relief. *See*
9 Docket No. 1; Compl. ¶ 17. Plaintiffs are now seeking \$8,250 in statutory damages, \$420 in costs,
10 and a permanent injunction. Mot. at 1. Plaintiffs have the burden of proving their damages. *See*
11 *Cal. Sec. Cans*, 238 F. Supp. 2d at 1173.

12 **1. Statutory Damages**

13 The Copyright Act provides that a “copyright owner may elect, at any time before final
14 judgment is rendered, to recover, instead of actual damages and profits, an award of statutory
15 damages for all infringements involved in the action, with respect to any one work . . . in a sum of
16 not less than \$750 or more than \$30,000 as the court considers just.” 17 U.S.C. § 504(c)(1).
17 Plaintiffs here have requested only the minimum amount of statutory damages - \$750 for each of the
18 eleven acts of infringement listed in Exhibit A of Plaintiffs’ Complaint.⁴ The total amount of
19 statutory damages sought is \$8,250.

20 Under Section 504 of the Copyright Act, a plaintiff need not prove actual damages in order
21 to receive an award of statutory damages. *See L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149
22 F.3d 987, 996 (9th Cir. 1998), *cert. denied* 525 U.S. 1141 (1999) (“Because awards of statutory
23 damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages
24 whether or not there is adequate evidence of the actual damages suffered by plaintiff. . . .”) (quoting
25 *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)). Statutory damages under the
26 Copyright Act are particularly appropriate in cases in which the “defendant has failed to mount any

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28 ⁴ Plaintiffs are not seeking damages for any of the Copyrighted Recordings listed in Exhibit B.

1 defense or to participate in discovery, thereby increasing the difficulty of ascertaining plaintiff’s
2 actual damages.” *Jackson v. Sturkie*, 255 F. Supp. 2d 1096, 1101 (N.D. Cal. 2003).

3 Here, the damages sought by Plaintiffs are reasonable and appropriate in light of the finding
4 that at least eleven of the Plaintiffs’ Copyrighted Recordings were illegally downloaded and
5 distributed. *See, e.g., Warner Bros. Records Inc. v. Novak*, 06-5342 (FLW), 2007 WL 1381748
6 (D.N.J. May 9, 2007) (awarding plaintiffs the minimum amount of statutory damages for each
7 instance of infringement, costs and injunctive relief); *Barrera*, 2007 WL 1113949 (same); *Priority*
8 *Records LLC v. Rodriguez*, CV F 06-0484 AWI LJO, 2007 WL 120033 (E.D. Cal. Jan. 11, 2007)
9 (same); *Sony Music Entm’t Inc. v. Elias*, CV03-6387DT (RCX), 2004 WL 141959 (C.D. Cal. Jan.
10 20, 2004) (same). Accordingly, the Court recommends that Plaintiffs be awarded \$8,250 in statutory
11 damages as requested in the Complaint and Motion.

12 **2. Costs**

13 Rule 54 of the Federal Rules of Civil Procedure states that “[e]xcept when express provision
14 therefor is made either in statute of the United States or in these rules, costs other than attorneys’
15 fees shall be allowed as of course to the prevailing party. . . .” Fed. R. Civ. P. 54(d)(1). Entry of
16 default judgment constitutes success on the merits. *See Sony Music Entm’t v. Global Arts Prods.*, 45
17 F. Supp. 2d 1345, 1347 (S.D. Fla. 1999). Here, Plaintiffs seek to recover only the costs associated
18 with bringing the action which include \$350 for filing the lawsuit and \$70 for service of process.
19 Kerr Decl. ¶ 17. Local Rule 54-3(a) specifically allows the Court to award these costs. N.D. Cal.
20 Civ. R. 54-3(a). The Court therefore recommends that Plaintiffs’ request for costs in the amount of
21 \$420 be granted.

22 **3. Injunctive Relief**

23 Plaintiffs also request that the Court issue a permanent injunction to enjoin Defendant’s
24 copyright infringement. Specifically, Plaintiffs request that the Court issue the following injunction:

25 Defendant shall be and hereby is enjoined from directly or indirectly
26 infringing Plaintiffs’ rights under federal or state law in the
27 Copyrighted Recordings and any sound recording, whether now in
28 existence or later created, that is owned or controlled by Plaintiffs (or
any parent, subsidiary, or affiliate record label of Plaintiffs)
 (“Plaintiffs’ Recordings”), including without limitation by using the

1 Internet or any online media distribution system to reproduce (i.e.,
2 download) any of Plaintiffs’ Recordings, to distribute (i.e., upload)
3 any of Plaintiffs’ Recordings, or to make any of Plaintiffs’ Recordings
4 available for distribution to the public, except pursuant to lawful
5 license or with the express authority of Plaintiffs. Defendant also shall
6 destroy all copies of Plaintiffs’ Recordings that Defendant has
7 downloaded onto any computer hard drive or server without Plaintiffs’
8 authorization and shall destroy all copies of these downloaded
9 recordings transferred onto any physical medium or device in
10 Defendant’s possession, custody, or control.

7 Mot. at 8-9. This is the same injunction prayed for in the Complaint. *See* Docket No. 1.

8 The Copyright Act authorizes the Court to grant a permanent injunction “on such terms as it
9 may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). In
10 general, evidence of copyright infringement and the threat of future violations is sufficient to warrant
11 the granting of a permanent injunction. *Sega Enters. Ltd. v. Maphia*, 948 F. Supp 923, 940 (N.D. Cal.
12 1996) (finding that continued access to the equipment that allowed defendant to illegally download
13 and distribute game programs constituted a threat of future copyright violations); *see also MAI Sys.*
14 *Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (finding that a computer servicing
15 company that maintained computers in its inventory with protected software presented a threat of
16 future copyright violations and warranted an injunction); *Twentieth Century Fox Film Corp. v.*
17 *Streeter*, 438 F. Supp. 2d 1065, 1072 (D. Ariz. 2006) (granting a permanent injunction upon entry of
18 default judgment in a copyright infringement action).

19 The Court may consider four factors in determining whether to issue a permanent injunction:
20 (1) irreparable harm; (2) success on the merits; (3) a balancing of competing claims of injury to the
21 parties; and (4) consideration of the public interest. *Global Arts Prods.*, 45 F. Supp. 2d at 1347.
22 “Injunctive relief is a traditional remedy for copyright infringement and is especially favored where
23 there is a history of continuing infringement and a substantial threat of continued infringement. In
24 such a case, a district court ought not only to issue a broad permanent injunction protecting present
25 works, but can protect works not yet created.” *Id* (citations omitted).

26 The elements required for issuing a permanent injunction are satisfied here. Evidence of
27 copyright infringement is presumed to give rise to irreparable harm. *See Elektra Entm’t Group Inc. v.*
28 *Bryant*, No. CV 03-6381GAF (JTLX), 2004 WL 783123, at *17 (C.D. Cal. Feb. 13, 2004); *see also*

1 *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998) (“[I]n a copyright infringement
2 claim, a showing of a reasonable likelihood of success on the merits raises a presumption of
3 irreparable harm.”). The entry of default against Defendant establishes success on the merits for
4 Plaintiffs and therefore irreparable harm is presumed. *See Rodriguez*, 2007 WL 120033, at *5.

5 Plaintiffs also have adequately demonstrated that they will suffer irreparable harm if
6 Defendant is not permanently enjoined. Defendant’s use of an online media distribution system to
7 download and distribute copyrighted materials leaves Plaintiffs’ Copyrighted Recordings vulnerable
8 to “massive, repeated, and worldwide infringement.” *Twentieth Century Fox*, 438 F. Supp. 2d at
9 1073. “When digital works are distributed via the internet . . . every downloader who receives one of
10 the copyrighted works from Defendant is in turn capable of also transmitting perfect copies of the
11 works. Accordingly, the process is potentially exponential rather than linear, threatening virtually
12 unstoppable infringement of the copyright.” *Id.* at 1073 n.2. Furthermore, Defendant’s failure to
13 appear in this action provides the Court with no assurance that the Defendant’s infringement will not
14 continue. *See Jackson*, 255 F. Supp. 2d at 1103. The Court also cannot discern any detriment to
15 Defendant that would outweigh the harm to Plaintiffs if an injunction were issued.

16 The public interest also weighs in favor of granting a permanent injunction in this case.
17 Injunctions issued pursuant to Section 502 of the Copyright Act serve the public interest by
18 upholding copyright protections. *See Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476,
19 1499 (10th Cir. 1993). As noted by the Third Circuit, “the public interest can only be served by
20 upholding copyright protections and . . . preventing the misappropriation of the skills, creative
21 energies, and resources which are invested in the protected work.” *Apple Computer, Inc. v. Franklin*
22 *Computer Corp.* 714 F.2d 1240, 1255 (3d Cir. 1983). Accordingly, the Court finds that permanent
23 injunctive relief is appropriate in this case.

24 Rule 65 of the Federal Rules of Civil Procedure requires that “[e]very order granting an
25 injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; [and] shall
26 describe in reasonable detail . . . the act or acts sought to be restrained. . . .” Fed. R. Civ. P. 65(d).
27 Generally, “an injunction must be narrowly tailored to remedy only the specific harms shown by the
28 plaintiffs rather than to enjoin all possible breaches of the law.” *Iconix, Inc. v. Tokuda*, 457 F. Supp.

1 2d 969, 998-1002 (N.D. Cal. 2006) (citing *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir.
2 2004). The form and scope of Plaintiffs’ proposed injunction is in large part reasonable and
3 appropriate.⁵

4 Plaintiffs justifiably seek to prohibit the infringement not only of Plaintiffs’ existing
5 copyrighted recordings, but also future copyrighted recordings not yet created. Mot. at 12. An
6 injunction protecting against infringement of future copyrighted works is permitted, and it is
7 appropriate to grant such an injunction upon entry of default judgment. *Universal City Studios v.*
8 *Martinez*, No. 06-01128 OWW-SMS, 2007 WL 587185, at *5 (E.D. Cal. Feb. 26, 2007) (citing
9 *Princeton Univ. Press v. Michigan Document Serv. Inc.*, 99 F.3d 1381, 1392-93 (6th Cir. 1996))
10 (“The weight of authority supports the extension of injunctive relief to future works.”); *see also*
11 *Global Arts Prods.*, 45 F. Supp. 2d at 1347-48 (granting a permanent injunction protecting both
12 current and future copyrighted works). It is also proper upon a showing of infringement to order the
13 destruction of all copies or phonorecords made or used in violation of the copyright owner’s
14 exclusive rights. 17 U.S.C. § 503(b); *Martinez*, 2007 WL 587185, at *5.

15 Plaintiffs are also entitled to an injunction that covers the Copyrighted Recordings and any
16 sound recordings owned or controlled by Plaintiffs or to which Plaintiffs are the licensees of
17 exclusive rights. *See Capitol Records, Inc. v. Schmidt*, No. 06-5433 SC, 2007 WL 155577, at *5
18 (N.D. Cal. June 7, 2007) (citing *Pickler Int’l Corp. v. Imaging Equip. Serv. Inc.*, 931 F. Supp. 18, 45
19 (D. Mass. 1995) (“[W]hen . . . there has been a history of copyright infringement which persuades the

21 ⁵ The Court acknowledges that judges both within and outside of this District have come to
22 differing conclusions with respect to the specific language of permanent injunctions issued in this type
23 of copyright infringement action. In a nearly identical action with Plaintiffs seeking the same injunction
24 as requested here, this Court previously recommended, and Judge White adopted, that the injunction be
25 granted in full. *See Sony BMG Music Entm’t v. Miller*, No. C-06-0410 JSW (JCS). Judge White,
26 however, recently adopted a recommendation from Judge Chen which found the same injunction overly
27 broad with respect to three provisions. *See Barrera*, 2007 WL 1113949 at *6. Judge Chen’s
28 recommendation did note that other district court judges had adopted the plaintiffs’ proposed injunction
without objection. *See Barrera*, 2007 WL 1113949, at *6 n.3. It appears that a majority of district
courts have adopted Plaintiffs’ proposed injunction without modification. *See, e.g., Atl. Recording
Corp. v. Ellison*, 06-0787-WS-C, 2007 WL 1121278, at *5 (S.D. Ala. Apr. 16, 2007); *Priority Records,
LLC v. Rodriguez*, CV F 06-0484 AWI LJO, 2007 U.S. Dist. LEXIS 7981, at * 3 (E.D. Cal. Feb. 2,
2007); *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1075 (D. Ariz. 2006);
Elektra Entm’t Group Inc. v. Bryant, CV 03-6381 GAF (JTLX), 2004 WL 783123, at *6 (C.D. Cal. Feb.
13, 2004).

1 court that there is a threat of future violations, an injunction may properly be entered which applies
2 not only to the works as to which infringement has already been adjudicated, but also to any other
3 works presently owned by plaintiff.”) (internal quotation marks omitted)).

4 Similarly, the injunction may extend to sound recordings owned or controlled by Plaintiffs
5 and their parent, subsidiary, or affiliate record labels. *See Warner Bros. Records Inc. v. Hughes*, No.
6 06-3112, 2007 WL 315356, at *2 (C.D. Ill. Jan. 31, 2007) (citing *Chicago Bd. of Educ. v. Substance*,
7 *Inc.*, 354 F.3d 624, 632 (7th Cir. 2003)). In *Barrera*, Judge Chen found that including such entities
8 within the injunction “does not give reasonable notice of what conduct would be included within the
9 scope of the injunction because a reasonable person would not know what entities or . . . operations
10 constitute parents, subsidiaries, or affiliate record labels. . . .” *Barrera*, 2007 WL 1113949, at *7
11 (quoting *Warner Bros. Records Inc. v. Malacara*, No. 06-00630-OWW-SMS, 2007 U.S. Dist. LEXIS
12 13421, at *20 (E.D. Feb. 26, 2007)). However, as noted above, a claim of direct copyright
13 infringement requires that a plaintiff establish: (1) copyright ownership of the infringed material; and
14 (2) acts of infringement. *See Marder v. Lopez*, 450 F.3d at 453. Notice of copyright ownership is not
15 an element of a claim and infringement may be established even where the alleged infringer is
16 unaware of the existence of a copyright. Indeed, even with respect to an injunction against violation
17 of Plaintiffs’ copyrights, Defendant is unlikely to know which songs are copyrighted by Plaintiffs.
18 Moreover, an injunction which did not include Plaintiffs’ related companies would be rendered
19 ineffective in the event that Plaintiffs undertook any reorganization that transferred title to the
20 copyrights to another of their related entities.

21 Plaintiffs’ proposed injunction is overly broad, however, in that it seeks to enjoin the
22 infringement of Plaintiffs’ rights under both federal and state law. Compl. ¶ 17. Plaintiffs’
23 Complaint alleges only federal claims pursuant to the Copyright Act and no state law claims have
24 been adjudicated. This provision of the proposed injunction is therefore not narrowly tailored to the
25 specific harms perpetrated by Defendant against Plaintiffs. *See Barrera*, 2007 WL 1113949 at *6;
26 *Malacara*, 2007 U.S. Dist. LEXIS 13421, at *19-20. Moreover, the Copyright Act preempts any
27 state law copyright claims, largely nullifying the protection afforded by enjoining infringement of
28 Plaintiffs’ rights under state law. *See Laws v. Sony Music Entm’t*, 448 F.3d 1134, 1137 (9th Cir.

1 2006). Accordingly, the injunction should only enjoin Defendant from infringing Plaintiffs’ rights
2 under federal law.

3 **IV. RECOMMENDATION**

4 The Court RECOMMENDS that:

5 1) Plaintiffs’ Motion for Entry of Default Judgment Against Defendant Greg Pinheiro be
6 GRANTED;

7 2) The Clerk be directed to enter judgment for Plaintiffs and against Defendant in the
8 amount of \$8,250 in statutory damages and \$420 in costs; and

9 3) The Clerk be directed to enter judgement for Plaintiffs and against Defendant
10 enjoining Defendant from directly or indirectly infringing Plaintiffs’ rights under federal law in the
11 following copyrighted sound recordings:

- 12 • “Go Your Own Way,” on album “Rumours,” by artist “Fleetwood Mac” (SR# N39857);
- 13 • “Buffalo Springfield Again,” on album “Silver & Gold,” by artist “Neil Young” (SR#
14 279-970);
- 15 • “I’d Die for You,” on album “Slippery When Wet,” by artist “Bon Jovi” (SR# 71-794);
- 16 • “My Favorite Mistake,” on album “The Globe Sessions,” by artist “Sheryl Crow” (SR#
17 279-383);
- 18 • “Roll With It,” on album “Roll With It” by artist “Steve Winwood” (SR# 93-680);
- 19 • “Get Real Paid,” on album “Midnite Vultures,” by artist “Beck” (SR# 276-479);
- 20 • “In the End,” on album “Dookie,” by artist “Green Day” (SR# 185-457);
- 21 • “Gimme All Your Lovin’,” on album “Eliminator,” by artist “ZZ Top” (SR# 45-132);
- 22 • “In Between Days,” on album “The Head on the Door,” by artist “The Cure” (SR# 65-
23 872)
- 24 • “Waiting For A Girl Like You,” on album “Foreigner 4,” by artist “Foreigner” (SR# 27-
25 769);
- 26 • “Jackass,” on album “Warning,” by artist “Green Day” (SR# 288-352);

27 and in any sound recording, whether now in existence or later created, that is owned or controlled by
28 Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) (“Plaintiffs’ Recordings”),

1 including without limitation by using the Internet or any online media distribution system to
2 reproduce (i.e., download) any of Plaintiffs' Recordings, to distribute (i.e., upload) any of Plaintiffs'
3 Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except
4 pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy
5 all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or
6 server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings
7 transferred onto any physical medium or device in Defendant's possession, custody, or control.

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9 Dated: June 21, 2007

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12 JOSEPH C. SPERO
13 United States Magistrate Judge
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United States District Court
For the Northern District of California