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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MOTOWN RECORD COMPANY, L.P.,
a California limited partnership;
WARNER BROS. RECORDS, INC., a
Delaware corporation; and SONY MUSIC
ENTERTAINMENT, a Delaware general
partnership,

Plaintiffs,

v.

LUMUMBA MUSHONGA

Defendant.

Civil No. 06cv383-L(AJB)

**ORDER GRANTING PLAINTIFFS’
MOTION FOR DEFAULT
JUDGMENT**

Pending before the court is Plaintiffs’ Application for Entry of Default Judgment by the Court (“Application”) against Defendant Lumumba Mushonga. The complaint alleges several instances of copyright infringement by downloading from the Internet and distributing copyrighted songs without permission. The court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a), (b) and 1367. Venue is proper under 28 U.S.C. § 1391(b). Defendant has not appeared in this action and has not opposed Plaintiffs’ Application. For reasons which follow, Plaintiffs’ Application is **GRANTED**.

Pursuant to Rule 55(b), a court may order default judgment following the entry of default by clerk. Default was entered on May 22, 2006.

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1 An entry of default does not automatically entitle a plaintiff to a court-ordered judgment.
2 *See Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986). Rather, granting or denying relief
3 is within the court's discretion. *See id.* Upon entry of default, the well-pleaded allegations of the
4 complaint are taken as true, except for the allegations as to the amount of damages. *See*
5 *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

6 Plaintiffs, recording companies, filed a copyright infringement action pursuant to 17
7 U.S.C. § 101 *et seq.* They are copyright owners or exclusive licensees with respect to certain
8 sound recordings, including eight recordings listed in Exhibit A to the complaint and certain of
9 the songs listed in Exhibit B. (Compl. ¶ 9, Ex. A & B¹.) Defendant used an online media
10 distribution system to download recordings copyrighted to Plaintiffs, and to distribute them to
11 the public or make them available for distribution to others in violation of Plaintiff's exclusive
12 rights of reproduction and distribution. (*Id.* ¶ 11.) Notices of Plaintiffs' rights were posted on
13 published copies of each of the recordings listed in Exhibit A, and were widely available. (*Id.*
14 ¶ 12.) Accordingly, Plaintiffs allege that the infringement was willful and intentional. (*Id.* ¶ 13.)
15 Plaintiffs seek statutory damages pursuant to 17 U.S.C. § 504©), attorneys' fees and costs
16 pursuant to 17 U.S.C. § 505, and injunctive relief pursuant to 17 U.S.C. §§ 502 and 503
17 prohibiting Defendant from further infringing Plaintiffs' copyrights and ordering him to destroy
18 all copies made in violation of those rights. (*Id.* at 4.)

19 The summons and complaint were served on Defendant by personal service on March 29,
20 2006. However, Defendant failed to answer or otherwise appear in the action. He did not
21 respond to Plaintiffs' request for entry of default, which was served on Defendant by mail on
22 May 19, 2006 or the Clerk's Notice of Entry of Default. Defendant also did not respond to the
23 instant Application, which was served on him by mail on June 13, 2006.

24 The court finds Plaintiffs satisfied the procedural requirements to obtain a default
25 judgment, by showing that Defendant was properly served with process, and by showing that
26

27 ¹ The eight recordings listed in Exhibit A are also listed in Exhibit B. Exhibit B is a
28 much longer list which was apparently printed from a user file at KaZaA.com, a website which
allows users to search, download and share music.

1 Defendant is not a minor, incompetent or in military service. (Decl. of Leemore Libesman in
2 Supp. of Pls' Application for Entry of Default J. by the Court ("Decl."), filed 6/13/06, ¶ 6.)

3 In their Application, Plaintiffs seek a default judgment and relief limited to the
4 infringement of their rights with respect to the eight recordings listed in Exhibit A of the
5 complaint. They seek minimum statutory damages in the amount of \$6,000.00, costs in the
6 amount of \$413.24, and a permanent injunction as stated in the complaint. (Application at 1.)

7 The Ninth Circuit has enumerated the following factors the court may consider in
8 exercising discretion as to the entry of default judgment:

9 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's
10 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at
11 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.

12 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

13 Under *Eitel*, the court may consider the merits of the plaintiff's substantive claim and the
14 sufficiency of the complaint. *Id.* at 1471. These two factors require that a plaintiff "state a claim
15 on which the [plaintiff] may recover." *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172,
16 1175 (C.D. Cal. 2002), *citing Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). To state
17 a copyright infringement claim, a plaintiff must allege two elements: "(1) ownership of a valid
18 copyright, and (2) copying of constituent elements of the work that are original." *Rice v. Fox*
19 *Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003), *quoting Feist Publ'n Inc. v. Rural Tel. Serv.*
20 *Co.*, 499 U.S. 340, 361(1991); *see also* 17 U.S.C. §§ 102(a)(7), 106 & 501(a), (b). Use of a
21 website to download and upload copyrighted music constitutes direct infringement of copyright
22 holders' exclusive rights to reproduce the material and distribute it. *See A&M Records v.*
23 *Napster, Inc.*, 239 F.3d 1004, 1011-14 (9th Cir. 2001). Accordingly, the court finds that the
24 complaint sufficiently states a claim that Defendant infringed Plaintiffs' copyright with respect
25 to the eight sound recordings listed in Exhibit A.

26 The "possibility of prejudice to the plaintiff" factor focuses on whether the plaintiff will
27 suffer prejudice if default judgment is not entered. In this case, Plaintiffs would be prejudiced
28 by the denial of their Application because they would likely be without other recourse or

1 recovery. *See Pepsico*, 238 F. Supp. 2d at 1177. Furthermore, Defendant’s infringing conduct
2 would remain unchecked.

3 Under the fourth factor, “the court must consider the amount of money at stake in relation
4 to the seriousness of Defendant’s conduct.” *Id.* at 1176. Plaintiffs do not discuss their actual
5 damages, but instead seek minimum statutory damages pursuant to 17 U.S.C. § 504. Under
6 section 504(a), an infringer is liable for actual damages and any additional infringer profits or,
7 alternatively, statutory damages. The copyright holder has the choice of which measure of
8 damages to pursue. *Id.* § 504©)(1). Statutory damages range from \$750 to \$30,000 with respect
9 to any one copyrighted work, as the court considers just. *Id.* “Because awards of statutory
10 damages serve both compensatory and punitive purposes, a plaintiff may recover statutory
11 damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or
12 of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of
13 discouraging infringement.” *Los Angeles News Serv. v. Reuters Television Int’l*, 149 F.3d 987,
14 996 (9th Cir. 1998) (internal quotation marks and citations omitted). Defendant’s alleged
15 infringing activity consisted of downloading from and uploading to a music-sharing website.
16 This is not an innocuous violation of Plaintiffs’ copyright, since it allows for unauthorized
17 distribution of copyrighted material to millions of Internet users. *See A&M Records*, 239 F.3d
18 1004. Because of its potential for wide reach, this practice is also referred to as “viral”
19 distribution of copyrighted material. *See id.* at 1027. Since the damages requested are minimum
20 statutory damages, the court finds they are reasonable in light of the seriousness of Defendant’s
21 conduct.

22 In addition, Plaintiffs request costs in the amount of \$413.24, which is comprised of a
23 \$250.00 filing fee and \$163.24 for service of process. (Decl. ¶ 7.) Pursuant to 17 U.S.C. § 505,
24 “the court in its discretion may allow the recovery of full costs . . .”

25 Under the fifth factor, the court considers the possibility of dispute concerning material
26 facts. Upon entry of default, all well-pleaded facts in the complaint are taken as true, except
27 those relating to the amount of damages. *See TeleVideo*, 826 F.2d at 917-18. Accordingly, no

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1 genuine dispute of material facts in this case precludes granting default judgment. *See Pepsico*,
2 238 F.Supp.2d at 1177.

3 As the sixth factor the court considers whether the default was due to excusable neglect.
4 Plaintiffs served Defendant with process, as well as with their request for entry of default.
5 Defendant was notified that the Clerk entered default against him, and was served with the
6 instant Application. Defendant did not respond to any of these documents, and has not appeared
7 in this action. Accordingly, the court has no reason to conclude that the default is due to
8 excusable neglect.

9 As the last factor, the court considers the policy favoring decision on the merits. Cases
10 should be decided on the merits whenever reasonably possible. *Eitel*, 728 F.2d at 1472.
11 However, the mere existence of Rule 55(b) indicates that this preference, standing alone, is not
12 dispositive. *Pepsico*, 238 F. Supp. 2d at 1177. Defendant's failure to answer the complaint or in
13 any way participate in this action makes a decision on the merits impractical, if not impossible.
14 *See id.* Based on consideration of the foregoing factors, the court finds that entry of a default
15 judgment against Defendant is appropriate in this case.

16 The court next considers whether Plaintiffs' requested relief should be awarded. In
17 addition to the statutory damages and costs discussed above, Plaintiffs request a permanent
18 injunction against Defendants. A "judgment by default may not be different in kind from or
19 exceed in amount that prayed for in the demand for judgment." Fed. R. Civ. P. 54(c)). This
20 provision has been interpreted to refer to the prayer for relief in the complaint. *See Pepsico*, 238
21 F. Supp. 2d at 1175.

22 The relief requested in the Application is the same as that requested in the prayer for
23 relief in Plaintiffs' complaint. It is therefore appropriate for consideration on default judgment.
24 For the reasons stated above, the court finds the award of \$6,000.00 in minimum statutory
25 damages and \$413.24 in costs is appropriate in this case.

26 In addition, a prevailing plaintiff in a copyright infringement action may obtain a final
27 injunction on such terms as the court may deem reasonable to prevent or restrain infringement of
28 a copyright. 17 U.S.C. § 502. As part of a final judgment, the court may also order destruction

1 of all copies found to have been made in violation of the copyright owner’s exclusive rights. *Id.*
2 § 503(b). “Generally, a showing of copyright infringement liability and the threat of future
3 violations is sufficient to warrant a permanent injunction.” *Jackson v. Sturkie*, 255 F. Supp. 2d
4 1096, 1103 (N.D. Cal. 2003), *citing MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520
5 (9th Cir. 1993).

6 Plaintiffs seek to permanently enjoin Defendant from infringing Plaintiffs’ copyright in
7 any of their sound recordings, whether existing or created in the future, and seek an order
8 ordering Defendant to destroy all unlawfully obtained copies of Plaintiffs’ recordings. (Compl.
9 at 4.) Defendant’s past infringing behavior and the ongoing ability to infringe Plaintiffs’
10 copyright constitute a continued threat of future infringing activity. *See Jackson*, 255 F. Supp.
11 2d at 1103. Defendant’s lack of participation in this action has given the court no assurance that
12 Defendant’s infringing activity will cease. *See id*; *see also Pepsico*, 238 F. Supp. 2d at 1178
13 (“Though it appears unlikely, given the lack of evidence submitted by Plaintiffs, that
14 Defendant’s allegedly wrongful conduct continued after Plaintiffs initiated this action or will
15 continue in the future, in the absence of opposition by the non-appearing defendant, it cannot be
16 said that it is ‘absolutely clear’ that Defendant’s allegedly wrongful behavior has ceased and will
17 not begin again.”).

18 Based on the foregoing, **IT IS HEREBY ORDERED** as follows:

- 19 1. Plaintiffs’ Application for Entry of Default Judgment by the Court is **GRANTED**.
- 20 2. Defendant Lumumba Mushonga (“Defendant”) shall pay damages to Plaintiffs, jointly,
21 in the total principal amount of Six Thousand Dollars (\$6,000.00).
- 22 3. Defendant shall further pay to Plaintiffs, jointly, their costs in the total principal
23 amount of Four Hundred Thirteen Dollars and Twenty-Four Cents (\$413.24).
- 24 4. Defendant shall be and hereby is enjoined from directly or indirectly infringing
25 Plaintiffs’ rights under federal or state law in the copyrighted recordings and any sound
26 recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or
27 any parent, subsidiary or affiliate record label of Plaintiffs) (“Plaintiffs’ Recordings”), including
28 without limitation by using the Internet or any online media distribution system to reproduce

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

8 5. The Clerk of the Court is instructed to prepare a judgment consistent with this order.

9 **IT IS SO ORDERED.**

10
11 DATED: February 15, 2007

12 
13 M. James Lorenz
United States District Court Judge

14 COPY TO:

15 HON. ANTHONY J. BATTAGLIA
16 UNITED STATES MAGISTRATE JUDGE

17 ALL PARTIES/COUNSEL

18 Lumumba Mushonga
19 446 Canyon Drive
Apartment 17
Oceanside, CA 92054