

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PEER INTERNATIONAL CORPORATION, PEER :
MUSIC LTD., ANAHI MUSIC, DIAM :
ENTERTAINMENT INC., MANZA MUSIC, SAMALEA :
SONGS, INC., COPYRIGHT ADMINISTRATION, INC., :
HOLLYSONGS, AIR BEAR MUSIC, :
STRIKING MUSIC, REGENT MUSIC CORPORATION, :
EDIMUSICA LTDA., and LATIN AMERICAN MUSIC :
COMPANY, INC., :
:
Plaintiffs, : 03 Civ. 0996 (KMW) (DF)
:
-against- : **REPORT AND**
:
MAX MUSIC & ENTERTAINMENT, INC., : **RECOMMENDATION**
MEL CARMONA, ALFRED PICALLO and :
MIGUEL DEGA, :
:
Defendants. :
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TO THE HONORABLE KIMBA M. WOOD, U.S.D.J.:

INTRODUCTION

On February 13, 2003, the above-named plaintiffs (“Plaintiffs”) filed a Complaint with this Court, alleging violations of the Copyright Act, 17 U.S.C. § 101 *et seq.*, by defendants Max Music & Entertainment, Inc. (“Max Music”) and Mel Carmona (“Carmona”), the president of Max Music. (Dkt. 1.) Max Music and Carmona were purportedly served with the Summons and Complaint on February 18, 2003. (Dkt. 3 & 4.) The Complaint was amended on March 20, 2003, to add as defendants Alfredo Picallo (“Picallo”), a former officer, and Miguel Dega (“Dega”), a former director of Max Music. (Dkt. 5.) The Summons and Amended Complaint were purportedly served on Dega, but not Picallo, who allegedly left the country several years ago. (Dkt. 6.)

None of the served defendants have moved, answered, or otherwise responded to the Complaint or Amended Complaint. As a result, on July 18, 2003, this Court (Wood, J.) granted a default judgment against defendants Max Music, Carmona, and Dega (collectively, “Defendants”), jointly and severally, and referred the matter to Magistrate Judge Dolinger to conduct an inquest and to make a report and recommendation regarding the appropriate measure of Plaintiffs’ damages, costs, and attorneys’ fees. (Dkt. 9.) The matter was then transferred from Magistrate Judge Dolinger to me.

For the reasons that follow, I recommend that Plaintiffs be awarded damages in the amount of \$900,000, plus \$59,684.39 in attorneys’ fees and \$3,192.55 in costs, on the default judgment against Defendants.

BACKGROUND

As alleged in Plaintiffs’ Complaint and Amended Complaint, and as supported by the documentation submitted by Plaintiffs in support of their Proposed Findings of Fact and Conclusions of Law, filed November 14, 2003 (“Proposed Findings”), the relevant facts¹ are as follows:

Plaintiffs own all or part of certain copyrighted musical compositions, and are in the business of publishing, licensing, and otherwise exploiting such compositions. (Amended Complaint, filed Mar. 20, 2003 (“Am. Compl.”), ¶ 2.) Defendant Max Music is in the business of distributing phonorecords embodying musical compositions; Carmona and Dega have or had responsibility for the control and operation of Max Music. (*Id.* ¶¶ 3, 4 & 6.)

¹ Where a defendant defaults, the Court should accept all of the factual allegations of the complaint as true, except those relating to damages. *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981).

Plaintiffs have an agency relationship with The Harry Fox Agency, Inc. (“Fox”), which allows Fox, on behalf of publisher-principals like Plaintiffs, to license copyrighted works to third parties. (*Id.* ¶¶ 9-10.) Max Music, under the direction of Carmona and wishing to make use of certain copyrighted compositions owned by Plaintiffs, applied for and was granted licenses for such use from Fox, pursuant to the compulsory license provisions of the Copyright Act, 17 U.S.C. § 115. (*Id.* ¶¶ 12-13.) The conditions of the licenses required Max Music to compile accurate statements of the use of the copyrighted material and to pay Plaintiffs royalties for such use. (*Id.* ¶ 13.) Max Music, however, failed to provide the required statements and to pay royalties due to Plaintiffs. (*Id.* ¶ 14.) Max Music and Carmona were notified by Fox in writing of these defaults. (*Id.* ¶ 17.) According to Plaintiffs, Dega was also informed or was otherwise aware of the defaults. (*Id.* ¶ 18.)

Fox, on behalf of Plaintiffs, attempted to resolve Max Music’s defaults, but was unsuccessful at achieving a resolution. (*Id.* ¶ 16.) Finally, Fox notified Max Music that, pursuant to the Copyright Act, the licenses previously granted to Max Music would automatically be terminated within 30 days, unless all defaults were cured within that time. (*Id.* ¶ 20.) Max Music failed to cure the defaults within the prescribed period, and Fox therefore terminated the licenses as of October 15, 2000. (*Id.* ¶ 21.) Max Music, however, continued through the date of the Complaint (and, purportedly, even up to the date of Plaintiff’s Proposed Findings (Proposed Findings at 4)) to make use of and presumably profit from Plaintiffs’ copyrighted compositions, in direct violation of the Copyright Act. (Am. Compl. ¶ 22.) Plaintiffs have sued for copyright damages.

DISCUSSION

Based on the above factual background, Plaintiffs allege that Max Music infringed the copyrights of 30 of Plaintiffs' compositions by making and distributing phonorecords embodying those compositions without license, in violation of Section 115 of the Copyright Act.

(*See* Proposed Findings at 1; Am. Compl. ¶ 30.) Plaintiffs also claim that the individual defendants are liable because they “directly participated in the infringing activities . . . and had the right and ability to supervise the infringing activities described and had a direct financial interest in such activities.” (Am. Compl. ¶¶ 32-33, 36-37.)

I. STATUTORY DAMAGES

Plaintiffs have chosen to pursue statutory damages under the Copyright Act. (*See* Proposed Findings at 5.) At the plaintiff's election, Section 504 of the Copyright Act allows the Court to assess statutory damages for each work for which the copyright has been infringed, in a “sum of not less than \$750 or more than \$30,000 as the court considers just,” 17 U.S.C. § 504(c)(1), without requiring a plaintiff to make a showing of profit by the defendant or loss by the plaintiff as a result of the infringing activity. Additionally, Section 504 authorizes the Court to increase the statutory damage award to any amount up to \$150,000 for each work involved, if the infringement was committed willfully. *See* 17 U.S.C. § 504(c)(2).

A. Willful Infringement

Here, Plaintiffs allege that Defendants' infringement was committed willfully. (*See* Proposed Findings at 5; Am. Compl. ¶¶ 29-37.) In support of this claim, Plaintiffs point out that Max Music had applied for and been granted licenses to make use of many copyrighted musical works, and thus Max Music and its principals knew that licenses were necessary in order

to use copyrighted materials legally. (See Proposed Findings at 5 & 10.) Max Music and Carmona also had actual knowledge that the licenses issued to Max Music were being terminated, since Carmona was sent correspondence (by certified mail) from Fox informing Carmona that such termination would automatically occur if defaults went uncured. (See *id.* at 3 & 10; Am. Compl. ¶¶ 17-18.) Plaintiffs further assert that “Dega [was] also notified of [Max Music’s] defaults and [was] otherwise aware of [the] defaults.” (Am. Compl. ¶ 18.)²

Plaintiffs conclude that, as Defendants knew that licenses were required in order to use copyrighted compositions, and as Defendants further knew that Max Music no longer possessed the necessary licenses, Defendants’ infringing use of Plaintiffs’ copyrighted works following termination of the licenses was willful. (See Proposed Findings at 10.) Accepting Plaintiffs’ factual allegations as true,³ and assuming that, at a minimum, Defendants recklessly disregarded Plaintiffs’ copyrights, a finding of willful infringement is warranted. See *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560 (S.D.N.Y. 1995) (willful infringement found where record company and its principal, after receiving notice terminating licenses, continued to manufacture and distribute phonorecords using copyrighted compositions); see also *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 112 (2d Cir. 2001) (even without actual knowledge of infringement, defendant’s “reckless disregard” for plaintiffs’ copyrights constituted willfulness). Additionally,

² Although Plaintiffs have not alleged that any correspondence regarding the termination of the licenses was directed personally to Dega, it seems reasonable to impute to Dega knowledge that Plaintiffs’ copyrighted works were being used in an unauthorized manner, given the uncontested allegations that Dega had responsibility for the management and operation of Max Music (Am. Compl. ¶ 6), that he actively cooperated in the infringing activities (*id.*), and that Fox had been attempting to resolve the defaults with Max Music for several years (*id.* ¶ 16).

³ See n.1, *supra*.

the entry of the default judgment alone supports the finding of willfulness. *See Tiffany (NJ) Inc. v. Luban*, 282 F. Supp. 2d 123, 124 (S.D.N.Y. 2003) (in a trademark case, the infringement was deemed willful by virtue of the defendant’s default); *Fallaci v. New Gazette Literary Corp.*, 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983) (in a copyright case, the court “dr[e]w a further inference of willfulness from the defendant’s failure to appear and defend th[e] action, especially in light of plaintiff’s allegation of willfulness and demand for increased statutory damages applicable to willful infringers”) (internal quotation marks and citation omitted).

B. Measure of Damages

Although “a default judgment entered on well-pleaded allegations in a complaint establishes defendant’s liability,” it does not reach the issue of damages. *Bambu Sales, Inc. v. Ozak Trading, Inc.*, 58 F.3d 849, 854 (2d Cir. 1995) (quoting *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 69 (2d Cir. 1971), *rev’d on other grounds*, 409 U.S. 363 (1973)). In their Proposed Findings, Plaintiffs have requested an award of the statutory maximum of \$150,000 for each of the 30 copyrighted compositions at issue (*see* Proposed Findings at 10-11), which would total \$4.5 million. Without a response from Defendants as to the damages issue, this Court must assess whether Plaintiffs have sufficiently demonstrated that they are entitled to the amounts claimed.

Statutory damages under the Copyright Act “serve[] two purposes – compensatory and punitive.” *Richard Feiner and Co., Inc. v. Passport Int’l Prods., Inc.*, No. 97 Civ. 9144 (RO), 1998 WL 437157, at *2 n.13 (S.D.N.Y. July 31, 1998) (quoting *Fitzgerald Publ’g Co., Inc. v. Baylor Publ’g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986)) (internal quotation marks omitted). Courts have “wide discretion” when determining appropriate statutory damages awards.

See Fitzgerald Publ'g, 807 F.2d at 1116. Factors to be evaluated when setting the amount of statutory damages “include the expenses saved and profits reaped by the infringer’s actions, the revenues lost by plaintiff, and the deterrent effect on others beside the defendant, as well as the specific deterrent effect to the defendants themselves.” *Richard Feiner* at *2 (quoting *Fitzgerald Publ'g*, 807 F.2d at 1117) (internal quotation marks omitted).

In the instant case, Plaintiffs make no real showing of actual lost revenues resulting from the infringing activity. Although Fox tenuously estimates that Max Music owes nearly \$1 million in royalties, plus interest, to Fox’s publisher-principals for use of copyrighted materials, that estimate is apparently inclusive of *all* publisher-principal-owned compositions licensed by Fox to Max Music, not only the 30 compositions at issue in this lawsuit. As Fox had licensed at least 367 copyrighted compositions overall to Max Music (*see Proposed Findings* at 2, 4), it appears that Plaintiffs’ actual lost revenues from Defendants’ infringing activity would only have been a fraction of the estimated \$1 million owed, perhaps less than \$100,000. Additionally, Plaintiffs do not provide any instructive information regarding any profits made by Defendants through the unlicensed use of Plaintiffs’ copyrighted works.

Rather than trying to make a persuasive argument that a large award of punitive damages would be justified here either by their losses or Defendants’ gains, Plaintiffs primarily assert that the deliberate and continuing nature of Defendants’ violations alone supports the imposition of a large penalty, simply for its deterrent effect. On this basis, Plaintiffs seek the maximum possible award of statutory damages: \$150,000 for each work that was the subject of Defendants’ infringement. (*See id.* at 10-11.)

In this Court's view, while Defendants' willful and continuing violations of the Copyright Act do justify a sanction, and while it is permissible for the Court to award statutory damages in amounts that "greatly exceed the actual damages shown," *Stevens v. Aeonian Press, Inc.*, No. 00 Civ. 6330 (JSM), 2002 WL 31387224, at *2 (S.D.N.Y. Oct. 23, 2002), imposing the maximum penalty in this case would permit an unjustifiably large recovery, *see Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 569 (S.D.N.Y. 1995) (when declining to award the statutory maximum, the court stated that "[s]tatutory damages are not intended to provide a plaintiff with a windfall recovery") (internal citations omitted). Indeed, in this Circuit, the maximum statutory penalty is rarely awarded for copyright infringement, and in most cases only where a party is found to have deliberately ignored a court decision indicating that the party's conduct constituted infringement. *See Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 288-89 (2d Cir. 1999) (maximum statutory damages warranted where defendant continued infringing activity even after a court found such activity by a related company to be unlawful infringement); *National Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 479-80 (S.D.N.Y. 2001) (similar); *see also Viacom Int'l Inc. v. Fanzine Int'l Inc.*, No. 98 Civ. 7448 (RCC), 2001 WL 930248, at *4-5 (S.D.N.Y. Aug. 16, 2001) (awarding the then-statutory maximum of \$100,000 per copyrighted work, where the fact that the defendant had previously been sued for similar cases of copyright infringement supported a finding of willful infringement).

Under the circumstances, I recommend that Defendants be awarded statutory damages in the amount of \$30,000 for each copyrighted work as to which Plaintiffs claim infringement, for a total statutory damages award of \$900,000. It appears that this amount would more than

compensate Plaintiffs for their actual losses (*see supra* at 7), would be high enough to deter Defendants and others from similar conduct in the future, and is consistent with statutory damages amounts awarded in similar cases. *See, e.g., Stevens* at *1-2 (awarding \$30,000 for each of sixteen copyrighted works, where defendants had willfully infringed); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 403 (S.D.N.Y. 2002) (awarding \$30,000 for willful infringement of copyright); *see also Luna Records*, 887 F. Supp. at 569 (at a time when the maximum penalty was \$100,000 per work, the court awarded publisher-principal plaintiffs between \$10,000 and \$15,000 per copyrighted musical work, where defendant willfully infringed; in setting the award, the court took into account “the small amount of actual damages suffered by plaintiffs, [] the hardship to defendant personally, and [] the liability he continues to face”).

II. ATTORNEYS’ FEES AND COSTS

_____ Plaintiffs also request an award of \$59,684.39 in attorneys’ fees and \$3,192.55 in costs, pursuant to Section 505 of the Copyright Act, 17 U.S.C. § 505.⁴ (*See Proposed Findings* at 12.)

While attorneys’ fees are not awarded automatically, *see Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535 n.19 (1994), such an award is appropriate where a defendant willfully infringes a plaintiff’s copyright, *see Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 289 (2d Cir. 1999). Here, as it appears that Defendants’ infringement of Plaintiffs’ copyrights was willful (*see supra* at 4-6), I recommend that Plaintiffs be awarded reasonable attorneys’ fees, in addition to other reasonable costs.

⁴ The statute allows recovery of “full costs,” of which reasonable attorney’s fees may be a part. 17 U.S.C. § 505.

When determining the reasonableness of attorneys' fees, this Circuit uses the "lodestar method," which involves comparison of the rates charged by the prevailing party's counsel with the rates charged by attorneys of similar skill and experience practicing in the same locality. *See Crescent Publ'g Group v. Playboy Enters., Inc.*, 246 F.3d 142, 150 (2d Cir. 2001). The rates charged by Plaintiffs' counsel in this action averaged \$354 per hour for partners, \$250 per hour for associates, and \$130 per hour for paralegals. (*See Proposed Findings at 6.*) These rates are reasonable when compared with the rates charged by attorneys of similar skill and experience practicing in New York City. *See Stevens*, 2002 WL 31387224, at *5-6 (citing *Yurman Designs, Inc. v. PAJ, Inc.*, 125 F. Supp. 2d 54 (S.D.N.Y. 2000)) (the court in both cases finding comparable billing rates to be reasonable).

Plaintiffs have adequately supported their claims for attorneys' fees by submitting an attorney declaration, contemporaneous time records, a statement regarding each attorney's individual billing rate, relevant resumes, and a chart showing average rates charged by intellectual property attorneys in the New York City area. (*See Declaration of Mitchell D. Bernstein*, dated Nov. 14, 2003, and attached exhibits.) While some of the attorney hours are high, they do not appear excessive, especially given Plaintiffs' explanation that counsel required many hours to gather and review information and documentation relating to chains of copyright title and to obtain the defaults in this action. (*See Proposed Findings at 13.*)

Pursuant to Section 505 of the Copyright Act, Plaintiffs can also recover their claimed costs for filing fees, postage, messenger expenses, telephone charges, legal research, and other documented expenditures, either as allowed costs under the general cost recovery statute,

28 U.S.C. § 1920,⁵ or as counsel's reasonable out-of-pocket expenses as part of the attorneys' fee recovery. *See United States Media Corp.*, 1999 WL 498216, at *7-11. Plaintiffs have sufficiently documented their costs by submission of contemporaneous time records listing disbursements and expenditures.

Overall, the fees and costs sought appear reasonable, and are recoverable under the applicable statutes. Therefore, I recommend that Plaintiffs' request for \$59,684.39 in attorneys' fees and \$3,192.55 in costs be granted.

CONCLUSION

For the foregoing reasons, I recommend that Plaintiffs be awarded judgment against Defendants Max Music, Carmona, and Dega, jointly and severally, in the amount of \$900,000 in statutory damages, \$59,684.39 in attorneys' fees, and \$3,192.55 in costs, for a total award of \$962,876.94.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, United States Courthouse, 500 Pearl Street, Room 1610, New York, New York, 10007, and to the chambers of the undersigned, United States Courthouse, 40 Centre Street, Room 631, New York, New York, 10007. Any requests for an extension of time for filing objections must be

⁵ *See United States Media Corp., Inc. v. Edde Entm't, Inc.*, No. 94 Civ. 4849 (MHD), 1999 WL 498216, at *7 (S.D.N.Y. July 14, 1999) ("The weight of authority indicates that the "full costs" referred to in the Copyright Act are nothing more than the costs allowed under 28 U.S.C. § 1920.").

directed to Judge Wood. FAILURE TO FILE OBJECTIONS WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. See *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
July 9, 2004

Respectfully submitted,

DEBRA FREEMAN
United States Magistrate Judge

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