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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CONTROVERSY MUSIC, ODNIL MUSIC
LIMITED, FIFTY-SIX HOPE ROAD, JOBETE
MUSIC CO., INC., BLACK BULL MUSIC
INC.,

No. C 03-5254 MJJ

Plaintiffs,

**CORRECTED ORDER GRANTING
PLAINTIFFS' APPLICATION FOR
DEFAULT JUDGMENT**

v.

AGONAFER SHIFERAW,
Defendant.

INTRODUCTION

Before the Court is Controversy Music, et. al.'s application for judgment by default. Plaintiffs seek injunctive relief, statutory damages in the amount of \$30,000 for four violations of the Copyright Act, and attorney's fees and costs totaling \$6,731 against defendant Agonafer Shiferaw. As defendant has failed to answer, appear, or otherwise defend the action, and as default has already been entered by the Clerk, the application for default judgment is GRANTED.

FACTUAL BACKGROUND

Plaintiffs are music publishers and members of ASCAP, the American Society of Composers, Authors, and Publishers. Plaintiffs have granted ASCAP a non-exclusive right to license nondramatic public performances of their copyrighted works. Pursuant to license

1 agreements, ASCAP collects license fees that are then distributed as royalties to its members. Defendant is
2 the owner and operator of Rassela's Jazz Club & Restaurant, located at 1534 Fillmore Street in San
3 Francisco, and plaintiffs allege that he has performed ASCAP songs without permission. Beginning in
4 December 1999, ASCAP approached defendant numerous times to secure a licensing agreement, but
5 defendant rebuffed these attempts. Believing that defendant was performing copyrighted songs without
6 permission, ASCAP sent an investigator to Rassela's on May 24, 2002. The investigator's report indicates
7 that four songs within the ASCAP library were performed by a band or disk jockey: "Kiss," "Trench Town
8 Rock," "I Wish," and "Superstition."

9 On October 30, 2002, plaintiffs filed a complaint against defendant, which was duly served upon
10 defendant on November 15, 2002 via personal service. Defendant has failed to answer the complaint,
11 appear in the action, or pursue a defense in any way, and the Clerk of the Court entered default on
12 December 23, 2002.

13 Plaintiffs seek an injunction prohibiting further unauthorized performances of works within the
14 ASCAP repertory, statutory damages in the amount of \$7,500 per song, and attorneys fees and costs,
15 pursuant to the Copyright Act, 17 United States Code §§ 502(a), 504(c)(1), and 505.

16 ANALYSIS

17 Rule 55(b)(2) of the Federal Rules of Civil Procedure provides that judgment by default may be
18 entered by the Court. "The general rule of law is that upon default the factual allegations of the complaint,
19 except those relating to the amount of damages, will be taken as true." *Televideo Systems, Inc. v.*
20 *Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (quoting *Geddes v. United Financial*
21 *Group*, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)).

22 Accepting the allegations of infringement as true, the Court must consider the nature of the relief
23 requested. As codified in 17 U.S.C. § 502, the Copyright Act clearly provides for the issuance of an
24 injunction to restrain the infringement of a copyright. In this case, plaintiffs have advanced claims that
25 defendant violated the copyrights they held in four works, but seek an injunction against defendant's
26 unauthorized performance of any ASCAP-licensed music. Plaintiffs cite a number of cases, often in the
27 posture of a grant of default judgment, in which such injunctions were issued. *See Cross Keys Publishing*
28 *Co., Inc. v. Wee, Inc.*, 921 F.Supp. 479, 481 (W.D.Mich. 1995); *Jobete Music Co., Inc. v. Hampton*,

1 864 F.Supp. 7, 9 (S.D.Miss. 1994), *Brockman Music v. Miller*, G 89-40650 CA, 1990 WL 132486 at
 2 *2 (W.D.Mich. 1990); *Brockman Music v. Mass Bay Lines*, 7 U.S.P.Q.2d 1089, 1091 (W.D.Mass.
 3 1988). The rationale behind the broad injunction against performance of all ASCAP songs is that plaintiffs
 4 in cases such as the one presently before the Court represent all ASCAP members, and thus, an injunction
 5 encompassing all ASCAP works is an appropriate remedy.¹

6 The Court finds this reasoning persuasive, and orders that defendant is permanently enjoined from
 7 publicly performing, or causing or permitting the public performance of, the music compositions “Kiss,”
 8 “Trench Town Rock,” “I Wish,” “Superstition,” or any musical composition licensed through the American
 9 Society of Composers, Authors, and Publishers in any premises owned, controlled, or conducted by the
 10 defendant, and from aiding or abetting the public performance of said compositions, without license to so
 11 perform or have performed.

12 Plaintiffs also request statutory damages in the amount of \$30,000, which represents an award of
 13 \$7,500 per song. This request is made pursuant to 17 U.S.C. § 504(c)(2), which governs damages in
 14 cases of willful infringement. Plaintiffs base their allegation of willfulness on the fact that in their efforts to
 15 secure a licensing agreement representatives from ASCAP initiated more than 80 separate contacts with
 16 defendant. (Declaration of Bonnie King ISO Application for Default Judgment (“King Decl.”) ¶ 8.) These
 17 contacts were by phone and letter, and often included a sample licensing agreement and informational
 18 material, all of which were designed to inform defendant of the need to secure a license with ASCAP in
 19 order to perform their works lawfully. (Id.) Plaintiffs also point to licensing agreements between ASCAP
 20 and defendant for another jazz club he owned: Razzela’s on California Street in San Francisco.
 21 Unauthorized performance of ASCAP songs at the latter establishment led to an earlier suit for copyright
 22 infringement in this Court, *Jobete Music Co., Inc. v. Agonafer Shiferaw*, C 98-4158 CRB. This suit was
 23 resolved in a settlement through which defendant and ASCAP entered into a license agreement for the
 24 California Street club, starting on January 1, 1999. (Id. ¶ 7.)

25 As the Copyright Act makes clear, an award of damages is within the discretion of the Court. *See*
 26 17 U.S.C. § 504(c). Factors the Court can consider in determining the amount of a damages award are:

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 28 ¹This is rationale given in all the cases except the last one, *Brockman Music v. Mass Bay Lines*. While
 the court in that case issued the same broad injunction, no explanation for its scope was offered. *Mass Bay
 Lines*, 7 U.S.P.Q.2d at 1091.

1 the expense saved by the defendant in avoiding a licensing agreement; profits reaped by defendant in
 2 connection with the infringement; revenues lost to the plaintiff; and the willfulness of the infringement. *Cross*
 3 *Keys Publishing*, 921 F.Supp. at 481 (citing *Boz Scaggs Music v. KND Corp.*, 491 F.Supp. 908, 914
 4 (D.Conn. 1980)). The Court can also consider the goal of discouraging wrongful conduct. *F.W.*
 5 *Woolworth Co., v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952). In this case, plaintiffs assert
 6 that a license for an establishment such as Rassela's on Filmore Street would cost \$1,943 per year, and
 7 that defendant has saved approximately \$5,600 by refusing to enter into a license from December 1, 1999
 8 to the present. (King Decl. ¶ 12.) Plaintiff also states that it has incurred \$1,521.83 in investigative
 9 expenses. (Id.)²

10 Considering the amount of the license fees for the Filmore Street location defendant avoided
 11 paying, the willfulness of his infringement of plaintiffs' copyrights, and the need to deter similar conduct, the
 12 Court ORDERS that defendant pay the amount of \$2,500.00 in statutory damages per song, for a total of
 13 \$10,000.00.

14 Finally, plaintiffs seek reimbursement of the attorney's fees and costs they have incurred in the
 15 prosecution of this action, under 17 U.S.C. § 505. Plaintiffs have submitted the Declaration of Jonathan R.
 16 Westen, which details the time spent and hourly rate of the lawyers and legal assistants who worked on the
 17 case. A total of 25 hours were spent, including the preparation of the complaint, the motion for default, and
 18 the application for default judgment, for a total of \$6,246. (Id., Schedule A.) Plaintiffs also present a total
 19 of \$485 in costs, including filing fees and the cost of serving defendant with the complaint and the notice of
 20 default. (Id.) The Court finds that the amount of time expended and the hourly rates charged are
 21 reasonable, and therefore awards \$6,246 in attorney's fees and \$485 in costs.

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28 ²Plaintiff also includes the amount that would have been owed from Rassela's on California Street, but any copyright infringement related to that establishment is not properly before the Court in the current suit, and these amounts are therefore irrelevant.

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CONCLUSION

For the reasons discussed above, plaintiffs’ application for judgment by default SHOULD BE GRANTED. Defendant is hereby permanently ENJOINED from publicly performing, or causing or permitting the public performance of, the music compositions “Kiss,” “Trench Town Rock,” “I Wish,” “Superstition,” or any musical composition licensed through the American Society of Composers, Authors, and Publishers in any premises owned, controlled, or conducted by the defendant, and from aiding or abetting the public performance of said compositions, without license to so perform or have performed. In addition, defendant is ORDERED to pay statutory damages to plaintiffs in the amount of \$10,000, and attorney’s fees and costs in the amount of \$6,731. The Clerk is directed to close the file.

IT IS SO ORDERED.

Dated: July 7, 2003

/s/
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California