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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 WESTERN DIVISION

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LUCASFILM LTD., a California corporation,

Plaintiff,

vs.

SHEPERTON DESIGN STUDIOS LIMITED, a United Kingdom company incorporated in England, ANDREW AINSWORTH, an individual, and DOES 1 through 10, both inclusive,

Defendants.

Case No. CV05-3434 RGK (MANx)

(Signature) PROPOSED ORDER GRANTING MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

NOTE CHANGES MADE BY THE COURT

36

1 **I. FACTUAL BACKGROUND**

2 Lucasfilm Ltd. ("Plaintiff") filed this action on May 6, 2005. Plaintiff's
3 Complaint alleges copyright infringement, unfair competition, trademark infringement
4 and state common law unfair competition against Shepperton Design Studios Limited
5 ("Shepperton") and Andrew Ainsworth ("Ainsworth") (collectively, "Defendants"), for
6 unauthorized exploitation of Plaintiff's copyrighted Stormtrooper and TIE fighter pilot
7 characters and Plaintiff's Imperial logo trademark.

8 Plaintiff caused each of the Defendants to be personally served in England with
9 a copy of the Summons and Complaint pursuant to the Convention on the Service
10 Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the
11 "Hague Convention"). On July 15, 2005 Defendants appeared in this action through
12 California counsel by filing their Stipulation with Plaintiff to extend the time for
13 Defendants to respond to the Complaint. On August 16, 2005 Defendants filed their
14 Motion and supporting Memorandum and Declarations requesting an Order dismissing
15 this action on the grounds the Court lacks personal jurisdiction over them. Plaintiff
16 filed opposition to Defendants' Motion and on September 12, 2006 Defendants filed a
17 Memorandum and additional Declarations in reply. On October 3, 2006 and after
18 considering the papers filed, this Court denied Defendants' Motion.

19 Defendants, however, failed to respond to the Complaint. On November 11,
20 2005, Plaintiff filed a First Amended Complaint against Defendants, which was served
21 on Defendants' California counsel. Plaintiff also caused each of the Defendants to be
22 personally served in England with a copy of the Summons and First Amended
23 Complaint pursuant to the Hague Convention. Defendants failed to respond to the
24 First Amended Complaint and on February 7, 2006, Plaintiff requested that the Clerk
25 enter Defendants' Default. On March 2, 2006, the Court granted that request and the
26 Clerk entered Defendants' Default that day.

27 Plaintiff now moves for entry of a Default Judgment. For the reasons discussed
28 below, the Court grants Plaintiff's Motion.

1 **II. JUDICIAL STANDARD**

2 Rule 55(b) of the Federal Rule of Civil Procedure provides for the Court's entry
3 of a default judgment following entry of default by the Clerk. "The FRCP and the
4 local rules in the Central District of California require that applications for default
5 judgment set forth the following information: (1) when and against which party default
6 was entered; (2) the identification of the pleadings to which default was entered; (3)
7 whether the defaulting party is an infant or incompetent person, and if so, whether that
8 person is adequately represented; (4) that the Soldiers' and Sailors' Civil Relief Act of
9 1940 does not apply; and (5) that notice of the application has been served on the
10 defaulting party, if required." *Philip Morris USA Inc. v. Castworld Products, Inc.*, 219
11 F.R.D. 494, 498 (C.D. Cal. 2003), *citing* F. R. Civ. P. 55(b)(2) & L. Rule 55-1.

12 "The district court's decision whether to grant or deny a default judgment is
13 discretionary in nature." *Elektra Entm't Group Inc. v. Crawford*, 226 F.R.D. 388, 392
14 (C.D. Cal. 2005). The Ninth Circuit has identified the following seven factors
15 applicable to the decision whether to grant a Default Judgment: (1) the possibility of
16 prejudice to the Plaintiff, (2) the merits of Plaintiff's substantive claim, (3) the
17 sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the
18 possibility of a dispute concerning material facts, (6) whether the default was due to
19 excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil
20 Procedure favoring decisions on the merits. *Id.*, *citing Eitel v. McCool*, 782 F.2d 1470,
21 1471-72 (9th Cir. 1986). "In applying this discretionary standard, default judgments
22 are more often granted than denied." *Elektra Entm't*, 226 F.R.D. at 392, *quoting*
23 *PepsiCo v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999).

24 **III. DISCUSSION**

25 **A. Plaintiff Has Fulfilled the Procedural Requirements for a Default**
26 **Judgment.**

27 Plaintiff has complied with Rule 55(b)(2) of the Federal Rules of Civil
28 Procedure and this Court's Local Rule 55-1, and the Declaration of Peter J. Anderson

1 establishes that (1) Defendants' default was entered by the Clerk on March 2, 2006; (2)
2 their default was entered as to the First Amended Complaint filed November 15, 2005;
3 (3) Defendants are not infants or incompetent persons; (4) the Soldiers' and Sailors'
4 Civil Relief Act of 1940 does not apply; and (5) notice of Plaintiff's Motion has been
5 served on Defendants.

6 **B. Application of the *Eitel* Factors.**

7 **1. Factor One: The Possibility of Prejudice to Plaintiff if a Default**
8 **Judgment is Not Entered.**

9 Plaintiff "would be denied the right to judicial resolution of the claims
10 presented" in this action if the Default Judgment is not entered. *Elektra Entm't*, 226
11 F.R.D. at 392. Further, Defendants, by choosing to default rather than appear and
12 defend, are "deemed to have admitted the truth of Plaintiff's averments," thereby
13 establishing their willful infringements and that Plaintiff would "likely suffer great
14 prejudice" if a Default Judgment in not entered. *Philip Morris*, 219 F.R.D. at 499.
15 The first *Eitel* factor therefore cuts in favor of granting Plaintiff's Motion.

16 **2. Factors Two and Three: The Merits of Plaintiff's Substantive**
17 **Claims and Sufficiency of Plaintiff's Pleading.**

18 The second and third *Eitel* factors are commonly analyzed together. *Pepsico,*
19 *Inc. v. California Security Cans*, 238 F. Supp. 2d 1172, 1175-76 (C.D. Cal. 2002);
20 *Elektra Entm't*, 226 F.R.D. at 392-93; *Philip Morris*, 219 F.R.D. at 499-500. These
21 "two *Eitel* factors 'require that a Plaintiff state a claim on which the [Plaintiff] may
22 recover.'" *Id.* at 499, quoting *Pepsico*, 238 F. Supp. 2d at 1175 (citations and
23 quotations omitted).

24 **(i) Plaintiff's First Claim for Relief: Defendants Infringed**
25 **Plaintiff's Copyrights.**

26 Plaintiff's First Claim for Relief is for infringement of the copyrights in the
27 preexisting Stormtrooper artwork and the 1977 *Star Wars* Film. To prevail on its
28 copyright infringement claim Plaintiff need only establish that (1) Plaintiff owns the

1 copyrights and (2) Defendants have violated “at least one of the exclusive rights
2 granted to copyright holders under 17 U.S.C. § 106.” *A & M Records, Inc. v. Napster,*
3 *Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

4 Plaintiff’s First Amended Complaint establishes that Plaintiff owns the
5 copyrights in the preexisting artwork and the 1977 *Star Wars* Film and has complied in
6 all respects with the Copyright Act, and that the Register of Copyrights has issued the
7 appropriate certificates of registration. First Amended Complaint (“FAC”) at 9, lines
8 21-23, & at 9, ¶ 21. Defendants’ failure to respond and defend constitutes an
9 admission that these statements are true. *Elektra Entm’t*, 226 F.R.D. at 392 (“After a
10 default has been entered by the court clerk, the well-pleaded factual allegations of the
11 complaint are taken as true, except for those allegations relating to damages”). The
12 copyright registrations issued by the Register of Copyrights also “constitute[s] prima
13 facie evidence of the validity of the copyright[s].” 17 U.S.C. § 410(c); *North Coast*
14 *Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992).

15 Plaintiff’s First Amended Complaint also establishes that Defendants have
16 violated Plaintiff’s exclusive rights under the Copyright Act, which include the
17 exclusive rights to copy Plaintiff’s works, to prepare derivative versions, to publicly
18 distribute copies and to display copies of the works. 17 U.S.C. § 106(1)-(3) & (5).
19 Violation of any one of these rights constitutes infringement. *A & M Records, Inc. v.*
20 *Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). These exclusive rights extend to
21 original characters visually depicted in artwork or movies. *Toho Co. v. William*
22 *Morrow & Co.*, 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998). “The fact that a work in
23 one medium has been copied from a work in another medium does not render it any the
24 less a ‘copy.’” 2 M. & D. Nimmer, *Nimmer on Copyright* § 8.01[B] (2005); *Rogers v.*
25 *Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied* 506 U.S. 934, 113 S.Ct. 365, 121
26 L.Ed.2d 278 (defendant’s bronze sculpture of litter of puppies infringed Plaintiff’s
27 photograph of puppies).

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1 Plaintiff alleges that Defendants copied Plaintiff's copyrighted artwork and
2 Plaintiff's fanciful characters in Plaintiff's copyrighted 1977 *Star Wars* Film, that
3 Defendants prepared three-dimensional copies of Plaintiff's copyrighted depictions,
4 that Defendants publicly distributed those copies and that Defendants also publicly
5 display them on Defendants' website, all without Plaintiff's consent. FAC at 5-9, ¶¶
6 10-12, 15, 17 & 22, & Ex. 4 attached thereto. Plaintiff's allegations in its First
7 Amended Complaint are more than sufficient to establish Defendants' multiple
8 infringements of Plaintiff's copyrights.

9 Accordingly, Plaintiff has established a substantial claim for copyright
10 infringement.

11 (ii) **Plaintiff's Second Claim for Relief: Defendants Also**
12 **Violated the Lanham Act.**

13 Plaintiff's Second Claim for Relief is for unfair competition under the Lanham
14 Act. The Lanham Act prohibits, *inter alia*, the use in connection with any goods or
15 services of any word, term or name, any false designation of origin or any false or
16 misleading description or representation in commercial advertising or promotion, that
17 misrepresents the nature, characteristics or qualities of the person's or anyone else's
18 goods, services or commercial activities. 15 U.S.C. § 1125(a)(1)(B).

19 Plaintiff's First Amended Complaint establishes that Defendants have violated
20 the Lanham Act by making in their advertising and promotion numerous false
21 descriptions and representations as to the nature, characteristics and qualities of
22 Defendants' products. Defendants' false representations in advertising and promoting
23 their products include Defendants' false representations that Defendants, not Plaintiff,
24 are the "original" designers and creators of Plaintiff's Stormtrooper and TIE fighter
25 pilot characters, that Defendants' products are made from the original molds used to
26 create the helmets and costumes worn by actors in Plaintiff's *Star Wars* Films and that
27 Defendants' products are "exact" duplicates of those helmets and costumes. FAC at 6-
28 7, ¶ 14-16, & at 10, ¶ 26, & at Ex. 4 attached thereto. Plaintiff also alleges that

1 Defendants willfully and deliberately made these false and misleading statements and
2 representations in advertising and promoting their products. *Id.* at 8, ¶ 17. As a result
3 of Defendants' decision not to appear and defend, these allegations are also deemed
4 true. *Elektra Entm't*, 226 F.R.D. at 392.

5 Accordingly, Plaintiff has also established a substantial claim for willful unfair
6 competition under the Lanham Act.

7 **(iii) Plaintiff's Third Claim for Relief: Defendants Also**
8 **Infringed Plaintiff's Trademark.**

9 The Lanham Act also prohibits the infringement of trademarks, even if they
10 have not been registered with the United States Patent and Trademark Office. *Two*
11 *Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767-68, 112 S.Ct. 2753, 120 L.Ed.2d
12 615 (1992) (infringement of unregistered marks prohibited by Section 43(a), 15 U.S.C.
13 § 1125(a)).

14 Plaintiff alleges that for nearly 30 years it has used the Imperial logo on the
15 well-known and instantly recognized TIE fighter pilot helmets and also as a trademark
16 for, e.g., entertainment-related activities, toys and other merchandise. FAC at 6, ¶ 13,
17 & Ex. 3 attached thereto. Plaintiff also alleges that Defendants have placed copies of
18 the Imperial logo on Defendants' helmets and in Defendants' advertising, deliberately
19 creating the false and misleading impression that Defendants or their products are
20 affiliated with or sponsored or approved by Plaintiff. *Id.* at 7, ¶ 15, at 8, ¶ 17 & at 11, ¶
21 30, & Ex. 4, at 20, attached thereto.

22 Plaintiff has therefore also established a substantial claim for trademark
23 infringement.

24 **(iv) Plaintiff's Fourth Claim for Relief: Defendants' Conduct**
25 **Also Constitutes Unfair Competition Under State Law.**

26 The California common law of unfair competition prohibits anticompetitive
27 activities including "passing off" and analogous misleading conduct by which a
28 defendant seeks to trade off of the Plaintiff's efforts. *Bank of the West v. Superior*

1 Court, 2 Cal.4th 1254, 1263, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992); *Lutz v.*
2 *DeLaurentiis*, 211 Cal. App. 4th 1317, 1322, 260 Cal. Rptr. 106 (1989) (use of
3 confusingly similar titles); 11 B. Witkin, *Summary of California Law* 762-67 (9th Ed.
4 1990).

5 Plaintiff alleges that Defendants are falsely stating that they designed and
6 created Plaintiff's Stormtrooper and TIE fighter pilot characters, helmets and
7 costumes, that Defendants are passing off their products as based on the "original" *Star*
8 *Wars* molds and as exact duplicates of Plaintiff's characters, helmets and costumes,
9 and that Defendants are copying Plaintiff's Imperial logo. FAC at 7-8, ¶¶ 15-17.
10 Further, Plaintiff alleges that Defendants have acted with the purpose of trading upon
11 the great public recognition associated with Plaintiff, its *Star Wars* Films and its
12 Stormtrooper and TIE fighter pilot characters. *Id.* at 8, lines 4-6.

13 Plaintiff has alleged substantial claims for copyright infringement, federal and
14 State unfair competition and trademark infringement, and therefore the second and
15 third *Eitel* factors also cut in favor of the entry of a Default Judgment.

16 **3. The Fourth Factor: The Amount of Money at Stake in the Action.**

17 Plaintiff seeks Judgment in the total amount of \$10,000,000, plus injunctive and
18 other relief and attorney's fees and costs. Given that Defendants are acting willfully,
19 that their infringements are ongoing, that they are reaping substantial profits from those
20 infringements and that once their motion to dismiss was denied Defendants chose not
21 to "comply with the judicial process or to participate in any way in the present
22 litigation," the "imposition of a substantial monetary award" is justified and this factor
23 also cuts in favor of entering a Default Judgment. *Philip Morris*, 219 F.R.D. at 500
24 (fourth *Eitel* factor favored default judgment where Defendants willfully imported a
25 large number of counterfeit cigarettes, there was a likelihood of damaging confusion
26 and Defendants defaulted; Plaintiff awarded maximum statutory damages of
27 \$2,000,000 under Lanham Act).

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1 4. **The Fifth Factor: The Possibility of a Dispute Concerning**
2 **Material Facts.**

3 A defendant’s failure to respond to a complaint indicates that “the likelihood that
4 any genuine issue may exist is, at best, remote.” *Philip Morris*, 219 F.R.D. at 500;
5 *Elektra Entm’t*, 226 F.R.D. at 393 (same). Here, Defendants are represented by
6 counsel, Defendants filed an unsuccessful motion to dismiss, Defendants were warned
7 their default would be taken and Defendants chose not to defend either Plaintiff’s
8 original Complaint or Plaintiff’s First Amended Complaint. Thus, the likelihood of
9 any genuine issue “is, at best, remote.” This factor also cuts in favor of entry of a
10 Default Judgment.

11 5. **The Sixth Factor: Whether The Default Was Due To Excusable**
12 **Neglect.**

13 Defendants were personally served with process, Defendants filed a motion to
14 dismiss and Defendants’ counsel has advised that Defendants decided not to defend
15 this action. Rather than excusable neglect, Defendants’ failure to respond to the First
16 Amended Complaint is due to “willful disobedience” of the Court’s Summons. *Philip*
17 *Morris*, 219 F.R.D. at 500-01; *Elektra Entm’t*, 226 F.R.D. at 393. This factor cuts in
18 favor of the entry of a Default Judgment.

19 6. **The Seventh Factor: The Strong Policy Underlying the Federal**
20 **Rules of Civil Procedure Favoring Decisions on the Merits.**

21 The seventh *Eitel* factor is the policy favoring decisions on the merits. *Eitel*, 782
22 F.2d at 1471-72. Defendants’ decision not to defend this case “makes a decision on the
23 merits impractical, if not impossible.” *Pepsico, Inc*, 238 F. Supp. 2d at 1177.

24 Accordingly, all of the *Eitel* factors cut decidedly in favor of entry of a Default
25 Judgment.

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1 C. Plaintiff's Remedies.

2 1. Defendants' Copyright Infringements: Actual Damages and
3 Profits.

4 Plaintiff's remedies under the Copyright Act include recovery of actual damages
5 and Defendants' profits from their infringements. 17 U.S.C. § 504(a). Actual damages
6 and profits "are two sides of the damages coin -- the copyright holder's losses and the
7 infringer's gains." *Polar Bear Prod., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir.
8 2004).

9 "Actual damages are usually determined by the loss in the fair market value of
10 the copyright, measured by the profits lost due to the infringement or by the value of
11 the use of the copyrighted work to the infringer." *Polar Bear*, 384 F.3d at 708,
12 quoting *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566 (7th Cir.
13 2003). Here, and consistent with *Polar Bear*, 384 F.3d at 709, Plaintiff seeks actual
14 damages based on Plaintiff's lost license fees that it would have received if Defendants
15 had licensed the rights that Defendants appropriated. On a Motion for default
16 judgment, "Plaintiff's burden in 'proving up' damages is relatively lenient." *Philip*
17 *Morris*, 219 F.R.D. at 498. Plaintiff has carried that burden and the evidence submitted
18 by Plaintiff establishes that a reasonable license fee for the *Star Wars* merchandising
19 rights that Defendants have appropriated for themselves exceeds the \$5,000,000 in
20 damages and profits that Plaintiff seeks on its first claim for copyright infringement.

21 As for Defendants' profits, Plaintiff is only required to prove Defendants'
22 revenues from their infringements. The burden is then on Defendants to prove their
23 deductible expenses and the portion, if any, of the profits attributable to non-infringing
24 factors. 17 U.S.C. § 504(b); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th
25 Cir. 2000) (quoting § 504(b)). "Accordingly, 'all gross revenue is presumed to be
26 profit "attributable to the infringement," unless the infringer is able to demonstrate
27 otherwise.'" 4 *Nimmer on Copyright* § 14.03[B] (emphasis added), quoting *Nelson-*
28 *Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 512 n.9 (4th Cir. 2002). "Any

1 doubt as to the computation of costs or profits is to be resolved in favor of the
2 Plaintiff.” “Any doubt as to the correctness of the profit calculation should . . . be
3 resolved in favor of the plaintiff.” *Eales v. Environmental Lifestyles, Inc.*, 958 F.2d
4 876, 881, n. 4 (9th Cir. 1992), *cert. denied*, 506 U.S. 1001, 113 S.Ct. 605, 121 L.Ed.2d
5 541.

6 Plaintiff has shown that Ainsworth’s Declaration filed in support of Defendants’
7 Motion to Dismiss establishes that Defendants’ revenues through August 12, 2005
8 totaled \$354,388, and that extrapolating from that figure, Defendants’ additional
9 revenues over the last 12 months are \$265,788, for a total of at least \$620,176.
10 Plaintiff has also established that 85% of worldwide *Star Wars* merchandising revenue
11 from replicas costing more than \$100, is derived from sales in the United States and,
12 accordingly, Defendants have received at least \$527,150 from their United States
13 infringements of copyright. Since a defendant who appears and defends but fails to
14 produce evidence of deductible expenses can claim none, *Nelson-Salabes*, 284 F.3d at
15 512 n. 10; Defendants can be in no better position where they refuse to appear at all
16 and chose instead to default. Defendants have not submitted any evidence of
17 deductible expenses and, as a result, the revenue figure is deemed their profits. *Id.*

18 Plaintiff’s actual damages and Defendants’ profits from Defendants’ copyright
19 infringements therefore exceed the \$5,000,000 in damages and profits that plaintiff
20 pleaded on this claim. Because plaintiff’s recovery on each claim is limited by the
21 amounts plaintiff pleaded in its First Amended Complaint and as to which defendants
22 chose to default, F. R. Civ. P. Rule 54(c), \$5,000,000 is properly awarded on this
23 claim.

24 **2. Defendants’ Unfair Competition and Trademark Infringement In**
25 **Violation Of The Lanham Act: Damages, Trebled, And Profits.**

26 Plaintiff’s remedies under its second and third claims for relief for Defendants’
27 unfair competition and trademark infringement in violation of the Lanham Act include

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1 Plaintiff's actual damages, which the Court may increase three-fold in appropriate
2 circumstances, and Defendants' profits. 15 U.S.C. § 1117(a).

3 Under the Lanham Act, "[d]amages are typically measured by any direct injury
4 which a plaintiff can prove, as well as any lost profits which the plaintiff would have
5 earned but for the infringement." *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 621
6 (9th Cir. 1993) (affirming award of damages based on plaintiff's lost profits), quoting
7 *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993), cert. denied 510
8 U.S. 815, 114 S.Ct. 64, 126 L.Ed.2d 34. As to lost profits, Plaintiff has submitted the
9 Declaration of Mr. Roffman, which establishes that the value of the rights that
10 Defendants appropriated for themselves is at least \$12,500,000 and that Plaintiff would
11 have received at least \$2,500,000 in license fees for those rights. To the extent not
12 duplicative of the award on the copyright claim, these damages are properly recovered
13 on the Lanham Act claims. In addition, Mr. Roffman's Declaration establishes that
14 Defendants' wrongful conduct has caused at least \$10,000,000 in damages to
15 Plaintiff's reputation and goodwill. This evidence is more than sufficient to meet the
16 "lenient" standard applicable on a motion for entry of default judgment. *Philip Morris*,
17 219 F.R.D. at 498. Further, in light of Defendants' willful violations of the Lanham
18 Act, trebling of those damages is appropriate under 17 U.S.C. Section 1117(a).

19 As to profits, Plaintiff is again only required to prove Defendants' revenues, 15
20 U.S.C. Section 1117(a); and Defendants' have forfeited the opportunity to prove
21 deductible costs. However, the award of profits on the Lanham Act claims are
22 subsumed within the award of profits on the copyright claim discussed above.

23 3. **Defendants' Unfair Competition In Violation Of State Law:**
24 **Compensatory and Punitive Damages.**

25 Plaintiff's monetary remedies for Defendants' unfair competition under State
26 law are compensatory ~~damages~~ damages. Cal. Civ. Code §§ 3333 & 3294.
27 Plaintiff's compensatory damages under this claim and the Lanham Act claims would
28 appear duplicative, however. ~~Plaintiff's compensatory damages under this claim and the Lanham Act claims would appear duplicative, however.~~

1 ~~which are not necessary to the fair use of the copyrighted material,~~
 2 ~~which Defendants are authorized to use under the Copyright Act.~~
 3 ~~Plaintiff's remedies include a permanent injunction against Defendants,~~
 4 ~~generally available to a single digital reproduction of compensatory damages.~~
 5 ~~17 U.S.C. § 502; *Abend v. MCA, Inc.*, 863 F.2d 1465, 479~~
 6 ~~U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990) ("a finding of [copyright] infringement presumptively entitles the Plaintiff~~
 7 ~~to an injunction"); 15 U.S.C. § 1116(a). The Court concludes that a permanent~~

8 **4. A Permanent Injunction.**

9 Plaintiff's remedies also include a permanent injunction against Defendants'
10 continued infringements. 17 U.S.C. § 502; *Abend v. MCA, Inc.*, 863 F.2d 1465, 479
11 (9th Cir. 1988)), *aff'd sub nom. Stewart*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d
12 184 (1990) ("a finding of [copyright] infringement presumptively entitles the Plaintiff
13 to an injunction"); 15 U.S.C. § 1116(a). The Court concludes that a permanent
14 injunction is appropriate here.

15 **5. Defendants' Surrender of the Infringing Materials.**

16 In addition, Plaintiff's remedies under the Copyright Act include an Order or
17 Judgment directing that the infringing copies and all "molds . . . or other articles by
18 means of which such copies . . . may be reproduced" be delivered up for "destruction
19 or other reasonable disposition." 17 U.S.C. § 503(b). This Section authorizes the
20 Court to direct that the copies and articles be destroyed or that they "be delivered to the
21 possession of the plaintiff." 4 *Nimmer on Copyright* § 14.08. The Court concludes
22 that an Order and Judgment requiring the delivery to Plaintiff of all infringing copies
23 and molds and other materials used in making the infringing copies, is appropriate in
24 this case.

25 **6. Prejudgment Interest.**

26 Plaintiff's remedies also include prejudgment interest. *See, e.g., Polar Bear*
27 *Prod., Inc. v. Timex Corp.*, 384 F.3d 700, 716-18 (9th Cir. 2004) (prejudgment interest
28 under Copyright Act).

1 **7. Attorneys' Fees and Costs.**

2 Plaintiff's copyright remedies include an award of attorney's fees and costs. 17
3 U.S.C. §§ 505 & 1202(b)(5). "[E]xceptional circumstances' are not a prerequisite to
4 an award of attorneys fees" under the Copyright Act, and instead "district courts may
5 freely award fees" if doing so "promote[s] the Copyright Act's objectives." *Historical*
6 *Research v. Cabral*, 80 F.3d 377, 378 (9th Cir. 1996). The factors considered in
7 awarding fees include "frivolousness, motivation, objective unreasonableness (both in
8 the factual and legal arguments of the case) and the need in particular circumstances to
9 advance considerations of compensation and deterrence." *Fogerty v. Fantasy, Inc.*,
10 510 U.S. 517, 534, n. 19, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994), quoting *Lieb v.*
11 *Topstone Industries, Inc.*, 788 F.2d 151, 156 (3d Cir. 1986) (parenthetical in original).

12 Defendants willfully infringed Plaintiff's copyrights and continue to do so today.
13 4 *Nimmer on Copyright* § 14.10[D][2][a] ("One of the most common circumstances
14 warranting an award of attorney's fees is deliberate infringement"). Defendants
15 ignored the opportunity to present a defense, choosing to disobey this Court's
16 Summonses. Also, considerations of compensation and deterrence are advanced by
17 requiring that Defendants reimburse Plaintiff its attorney's fees. Accordingly, the
18 factors all cut in favor of an award of attorney's fees to Plaintiff.

19 Further, since Plaintiff's non-copyright claims are related to the copyright claim
20 and arise from the same basic facts, no apportionment between the copyright and non-
21 copyright claims is required. *Entertainment Research Group, Inc. v. Genesis Creative*
22 *Group, Inc.*, 122 F.3d 1211, 1230 (9th Cir. 1997). In fact, in light of Defendants'
23 default without litigating any claims, an apportionment between fees incurred in
24 prosecuting the copyright and non-copyright claims would be impossible.
25 Alternatively, to the extent fees could be attributed to the Lanham Act claims, an
26 award of those fees is proper because this is an "exceptional" case under the Lanham
27 Act." 15 U.S.C. § 1117(a). "A trademark case is exceptional where the district court
28 finds that the defendant acted maliciously, fraudulently, deliberately, or willfully."

1 *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1216 (9th Cir., 2003).
2 Defendants willfully and deliberately infringed and made, and are continuing to make,
3 false representations in the advertising and promotion of their products. As a result,
4 this is an "exceptional" case and an award of attorney's fees under the Lanham Act is
5 appropriate. Also, the Lanham Act, Copyright Act and the State common law unfair
6 competition claims are "so intertwined that it is impossible to differentiate between
7 work done on" them and an apportionment is unnecessary. *Gracie v. Gracie*, 217 F.3d
8 1060, 1069 (9th Cir. 2000).

9 **IV. CONCLUSION**

10 For the foregoing reasons, Plaintiff's Motion for entry of Default Judgment is
11 granted.

12 **IT IS SO ORDERED.**

13
14 Dated: SEP 20 2006


Honorable R. Gary Klausner
United States District Judge

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19 Submitted by:
Peter J. Anderson, Esq., SBN 088891
20 E-mail: pja@pjanderson.com
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California and my business address is 100 Wilshire Boulevard, Suite 2010, Santa Monica, CA 90401. I am over the age of 18 and not a party to this action.

On August 21, 2006, I served the foregoing document described as **[PROPOSED] ORDER GRANTING MOTION FOR ENTRY OF DEFAULT JUDGMENT**, on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope at Santa Monica, California, addressed as follows:

William L. Robinson, Esq.
Lori A. Winfree, Esq.
Nixon Peabody LLP
2040 Main Street
Suite 850
Irvine, CA 92614

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. Correspondence for mailing is deposited with the United States Postal Service on that same day in the ordinary course of business. The foregoing document was sealed and placed for collection and mailing on the foregoing date, following the firm's ordinary practices. I am aware that on motion of any party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in the affidavit.

I caused such document to be delivered by hand to the offices of the addressee.

I placed such envelope in a box or other facility regularly maintained by Federal Express, in an envelope or package designated and provided by Federal Express, with delivery fees paid or provided for, addressed to the above-indicated addressees.

I also caused a copy of the foregoing document to be faxed to the addressee.

Executed on August 21, 2006 at Santa Monica, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

