

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

COMPENDIA SONGS,)
JONATHAN CHICO DeBARGE)
(d/b/a JOSEPH’S DREAM),)
CHUCH BOYZ PUBLISHING,)
DETABOB MUSIC,)
ILL THOUGHTZ,)
MUSIC OF DREAMWORKS, and)
ZOMBA MELODIES, INC.,)
)
Plaintiffs)

v.)

Civil Action No. 04-252 GMS

)
ON TOP COMMUNICATIONS, LLC,)
ON TOP COMMUNICATIONS)
OF MISSISSIPPI, LLC, ON TOP)
COMMUNICATIONS OF VIRGINIA, LLC,)
ON TOP COMMUNICATIONS OF LOUISIANA,)
LLC, and STEVE HEGWOOD,)
)
Defendants.)

MEMORANDUM

I. INTRODUCTION

On April 20, 2004, Compendia Songs (“Compendia”), Jonathan Chico DeBarge, d/b/a Joseph’s Dream (“Joseph’s Dream”), Chuch Boyz Publishing (“Chuch”), DETABOB Music (“DETABOB”), Ill Thoughtz (“Ill Thoughtz”), Music of Dream Works (“Dream Works”), and Zomba Melodies, Inc. (“Zomba”) (collectively, “the plaintiffs”) filed this action for willful copyright infringement of musical compositions against On Top Communications, LLC (“On Top”), On Top Communications of Mississippi, LLC (“On Top-MS”), On Top Communications of Virginia, LLC (“On Top-VA”), On Top Communications of Louisiana, LLC (“On Top-LA”), and Steve Hegwood (“Hegwood”) (collectively, “the defendants”) to obtain monetary and injunctive relief in addition to reasonable attorneys’ fees and costs. *See* 17 U.S.C. § 101 *et seq.* (the “Copyright Act”).

Although all of the defendants were served with a summons and a copy of the complaint, each failed to answer, move, or otherwise respond to the pleading. For this reason, the clerk of the court declared the defendants in default on June 10, 2004. *See* Fed. R. Civ. P. 55(a). The plaintiff's subsequently moved for the entry of a default judgment against the defendants. *See* Fed. R. Civ. P. 55(b). On October 4, 2004, the court held a hearing in order to determine whether the relief which the plaintiffs were requesting was reasonable. After considering the arguments and evidence presented by the plaintiffs at this hearing, the court concludes that, in addition to injunctive relief, monetary damages in the amount of \$25,000 per musical composition infringed by each of the defendants (for a total of \$200,000), and reasonable attorneys' fees and costs in the amount of \$13,660 and \$290, respectively, are appropriate given the facts of this case. The court bases its decision on the following reasons.

II. BACKGROUND

According to the complaint, the plaintiffs are affiliates of SESAC, Inc. ("SESAC"), a performing rights society, as defined under 17 U.S.C. § 101. The plaintiffs are the publishers and copyright owners of the allegedly infringed musical compositions.¹ The plaintiff's have granted SESAC the right to license, protect, and enforce public performance rights in their copyrighted musical compositions. The defendants On Top, On Top-MS, On Top-VA, and On Top-LA (collectively, the "On Top defendants") are Delaware limited liability companies engaged in the business of owning and operating commercial radio stations under license from the Federal

¹ The infringed musical compositions are "Be Encouraged," published and owned by Compendia; "No Guarantee," published and owned by Joseph's Dream; and "(You Made Me Ooh Girl) Deep," published and owned by Chuch, DETABOB, Ill Thoughtz, Dream Works, and Zomba.

Communications Commission (the “FCC”).² Hegwood is the chief executive officer (“C.E.O.”) of the On Top defendants, and has the ability to control the policies and practices of their radio stations, including the licensing and performance of music on the radio stations. Thus, Hegwood is responsible for any decision to license public performance rights for musical compositions through SESAC, or the other two performing rights societies in the United States.

The radio stations owned by the On Top defendants and controlled by Hegwood, WRJH, WWHV, and KNOU, publicly performed the copyrighted compositions “Be Encouraged,” “No Guarantee,” and “(You Made Me Ooh Girl) Deep” on multiple occasions without a license or other authorization:

- On September 11, 2002 and November 19, 2002, WRJH publicly performed “Be Encouraged;”
- On April 29, 2003, September 30, 2003, and February 12, 2004, WWHV publicly performed “Be Encouraged;”
- On September 30, 2003, KNOU publicly performed “Be Encouraged;”
- On June 27, 2003, WRJH, WWHV, and KNOU publicly performed “No Guarantee;”
- Between January 7, 2003 and February 14, 2003, KNOU publicly performed “(You Made Me Ooh Girl) Deep;” and
- On February 14, 2003, WWHV publicly performed “(You Made Me Ooh Girl) Deep.”

During the course of monitoring radio station broadcasts, SESAC detected the unauthorized public performance of the plaintiffs’ copyrighted compositions. Beginning in or about July 2001,

² On Top-MS owns and operates WRJH-FM (“WRJH”), Rankin Mississippi; On Top-VA owns and operates WWHV-FM (“WWHV”), Norfolk, Virginia; On Top-LA owns and operates KNOU-FM (“KNOU”), Jefferson, Louisiana.

SESAC contacted the defendants, by telephone and in writing, urging them to obtain a license authorizing the public performance of the plaintiffs' copyrighted compositions. SESAC received no response from the defendants and ultimately decided to initiate litigation on behalf of the plaintiffs. Prior to filing its complaint with the court, SESAC's counsel wrote to the defendants to attempt to get the defendants to enter into negotiations with it, comply with the copyright law, and obtain a license to publicly perform the musical compositions. The defendants again ignored SESAC's efforts to amicably resolve the matter. On October 9, 2003, SESAC's counsel sent the defendants another letter, again attempting to avoid litigation, in which it enclosed a copy of the draft complaint. The defendants did not respond to SESAC's letter. On March 25, 2004, Patrick Collins ("Collins"), the president and chief operating officer of SESAC, personally wrote to the defendants in a final attempt to avoid litigation. Collins pointed out that it would be in the defendants' best interest, financially, to obtain a license. Collins also called Hegwood three times between April 5, 2004 and April 12, 2004, in an attempt to arrive at a non-litigated business solution to the defendants' infringing conduct. Collins' calls were to no avail. Finally, after SESAC had received no response at all from the defendants over the course of approximately two years and nine months of repeated attempts at negotiation, the plaintiffs filed a complaint on April 20, 2004.

III. DISCUSSION

Because the defendants have failed to answer, move, or otherwise respond to the complaint, the entry of default judgment against them is appropriate. *Palmer v. Slaughter*, No. Civ. A. 99-899, 2000 WL 1010261, at *2 (D. Del. July 13, 2000). When a default judgment is entered on the well pled allegations of a complaint, the defendant's liability is established. *See Broadcast Music, Inc. v. R Bar of Manhattan, Inc.*, 919 F. Supp. 656, 658 (S.D.N.Y. 1996); *Schwartz-Liebman Textiles v. Last Exit Corp.*, 815 F. Supp. 106, 107 (S.D.N.Y. 1992). The court, however, is required to

calculate the appropriate amount of damages. It cannot simply accept the plaintiff's representations on this subject as being true. *See Broadcast Music*, 919 F. Supp. at 658; *Schwartz-Liebman*, 815 F. Supp. at 107.

In the motion for default judgment, the plaintiffs request statutory damages in the amount of \$25,000 per musical composition infringed by each of the defendants, for a total award of statutory damages in the amount of \$200,000.³ The plaintiffs further seek a permanent injunction, and to recover reasonable attorneys' fees and costs. *See* 17 U.S.C. §§ 502(a), 505.

On October 4, 2004, the court held a hearing to determine whether the plaintiffs' requests were reasonable. *Cf. Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir. 1997) (noting that even though a hearing might not be required, the court "should take the necessary steps to establish damages with reasonable certainty"); *accord James v. Frame*, 6 F.3d 307, 310 (5th Cir. 1993). After considering the plaintiffs arguments and the evidence which was presented at the hearing, the court concludes that the following relief is warranted: (1) an injunction which prohibits the defendants from publicly performing the plaintiffs' musical compositions; (2) statutory damages in the amount of \$25,000 for each defendant per musical composition infringed; and (3) attorneys' fees and costs in the amount of \$13,660 and \$290, respectively. The following sections explain the bases for this ruling more thoroughly.

A. Injunctive Relief

Given the allegations of the complaint, there can be no question that the defendants knowingly infringed on the plaintiffs intellectual property rights by publicly performing the plaintiffs' copyrighted musical compositions without a license or other authorization. Furthermore,

³ The maximum amount of statutory damages for copyright infringement is \$150,000 per infringer per work. *See* 17 U.S.C. § 504.

the defendants appear to have engaged in this conduct repeatedly, even after being contacted by SESAC to negotiate and obtain a license. Therefore, the plaintiffs are entitled to a permanent injunction under 17 U.S.C. § 502(a) to prevent the defendants from engaging in this type of conduct in the future. *See, e.g., Broadcast Music*, 919 F. Supp. at 659; *JoBete Music Co. v. Hampton*, 864 F. Supp. 7, 9 (S.D. Miss. 1994); *Music City*, 616 F. Supp. at 1002-03.

B. Statutory Damages for Copyright Infringement

Under 17 U.S.C. § 504©, the plaintiffs are entitled to “recover, instead of actual damages and profits, an award for infringements in the action, with respect to any one work, for which any one infringer is liable individually . . . in a sum not less than \$750 or more than \$30,000 as the court considers just.” 17 U.S.C. § 504(c)(1). However, if the “infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.” *Id.* § 504(c)(2). As the D.C. Circuit has explained, “statutory damages are to be calculated according to the number of works infringed, not the number of infringements.” *See Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990); *accord Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 143-44 (5th Cir. 1992) (“[I]f a plaintiff proves that one defendant committed five separate infringements of one copyrighted work, that plaintiff is entitled to only one award of statutory damages . . .”). In this case, the plaintiffs do not seek the maximum amount of statutory damages (\$150,000) for the defendants’ allegedly willful infringement of each of the three copyrighted musical compositions. Instead, the plaintiffs seek \$25,000 from each defendant for each musical composition infringed.

An award of statutory damages serves two purposes. It compensates the plaintiff for the infringement of its copyrights while, at the same time, serving as a deterrent by punishing the defendant for its unlawful conduct. *See Broadcast Music*, 919 F. Supp. at 659; *Schwartz-Liebman*,

815 F. Supp. at 108; *Music City*, 616 F. Supp. at 1003. When determining the appropriate level of statutory damages, the court must consider a number of factors, including the expenses saved and the profits earned by the defendant, the revenues lost by the plaintiff, and the defendants' state of mind. See *Broadcast Music*, 919 F. Supp. at 659-60; *JoBete Music*, 864 F. Supp. at 9; *Almo Music*, 798 F. Supp. at 394. Normally, it is the blameworthiness of the defendant which weighs the heaviest in the court's analysis. See *Almo Music*, 798 F. Supp. at 394 (citing *Milene Music, Inc. v. Gotauco*, 551 F. Supp. 1288, 1296 (D.R.I. 1982)).

Here, the court has no doubt that the defendants have willfully infringed the plaintiffs' copyrights. Given the allegations of the complaint, which must be taken as true given the default, the defendants were repeatedly contacted by SESAC and told to stop publicly performing the plaintiffs' musical compositions or to obtain a license to perform them legally. Regardless, the defendants never responded to SESAC's letters, even those that included copies of draft complaints, and continued to publicly perform the compositions. Thus, it is clear that the defendants were acting willfully and knowingly when they publicly performed the musical compositions on their radio stations without a license.

It is also equally clear that the statutory damages award that the plaintiffs request is reasonable and not excessive. The plaintiffs could have asked the court to award the maximum amount statutory damages: \$150,000 from each defendant for each infringed work (for a total statutory damages award of over one million dollars). However, the plaintiffs instead requested an award of \$25,000 from each defendant per infringed work (for a total statutory damages award of \$200,000). As several district courts have observed, it is important to place infringers on notice that "it costs less to obey the copyright laws than to violate them." See *Broadcast Music*, 919 F. Supp. at 660 (quoting *Rodgers v. Eighty Four Lumber Co.*, 623 F. Supp. 889, 892 (W.D. Pa. 1985));

accord Almo Music, 798 F. Supp. at 394 (quoting *Music City*, 616 F. Supp. at 1003); *see also JoBete Music*, 864 F. Supp. at 10 (“[I]n order to serve as a deterrent to copyright violators . . . it is deemed necessary and reasonable to allow recovery in excess of the license rate . . .”). Thus, under the facts of this case, the court believes that a statutory damages award of \$25,000 from each defendant per work would appear to adequately punish the defendants for their actions and, thus, deter both them and others from violating the copyright laws in the future.

C. Attorneys’ Fees and Costs

The court will also award the plaintiffs reasonable attorneys’ fees and costs incurred during this action. *See* 17 U.S.C. § 505. This court has awarded reasonable fees and costs in actions for copyright infringement, as an award of reasonable fees and costs tends to be the rule rather than the exception in actions for copyright infringement. *See Palmer*, 2000 WL 1010261, at *6-7 (citations omitted). When determining an appropriate amount to award, the court should again take into account the twin considerations of compensation and deterrence. *See Broadcast Music*, 919 F. Supp. at 660-61. In particular, when there appears to be significant merit to a plaintiff’s case, the court should focus its analysis on whether the defendant was acting intentionally, willfully, or in bad faith. *See id.* at 661.

Here, the failure of these defendants to respond to SESAC, after repeated attempts to resolve the matter without filing a law suit, demonstrates the willfulness of their conduct. Furthermore, after being contacted by SESAC and informed of their infringing behavior, the defendants decided to forego licensing the public performance rights through SESAC or another performing rights organization. The defendants deliberately performed copyrighted musical works publicly and without a license in an attempt to avoid the licensing fees. After the plaintiffs commenced their law suit, the defendants did not appear. Instead, they ignored the court and the legal process, while

continuing to publicly perform the musical compositions without compensating the plaintiffs. Given these facts, an award of reasonable attorneys' fees and costs is appropriate. However, the request for \$18,660 in fees is somewhat excessive.⁴ Admittedly, some of these expenses seem proper. For example, the attorneys spent nearly ten hours on research and drafting prior to filing the complaint.

Nevertheless, there appear to be some excessive charges on the billing statements submitted to the court. For example, preparing the default judgment motion papers resulted in over \$10,550 in fees, including \$4,400 for legal research. In addition, the attorneys billed \$4,400 for preparing for and participating in the default hearing, which lasted approximately one half hour. Taking these factors into account, the court will award the plaintiffs \$13,660 in attorneys' fees. Lead counsel shall receive \$12,427.50 of this allocation, and local counsel shall receive the \$1,232.50 balance.

Finally, the plaintiffs have requested \$290 in costs, for the cost of the filing fee and cost of service. These costs are not excessive. The court will, therefore, award costs in the full amount.

V. CONCLUSION

In order to adequately compensate the plaintiffs for the violation of their copyrights and to sufficiently punish the defendants for their misconduct, the court will afford the plaintiffs the injunctive relief which they request, in addition to awarding them statutory damages under the Copyright Act in the amount of \$200,000. The court will also award the plaintiffs attorneys' fees and costs in the amount of \$13,660 and \$290, respectively. The court will issue an order to this effect in conjunction with this opinion.

Dated: November 15, 2004

Gregory M. Sleet

⁴ Local counsel billed \$1232.50 and lead counsel billed \$17,427.50 in fees for a total of \$18,660.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

COMPENDIA SONGS,)
JONATHAN CHICO DeBARGE)
(d/b/a JOSEPH’S DREAM),)
CHUCH BOYZ PUBLISHING,)
DETABOB MUSIC,)
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OF MISSISSIPPI, LLC, ON TOP)
COMMUNICATIONS OF VIRGINIA, LLC,)
ON TOP COMMUNICATIONS OF LOUISIANA,)
LLC, and STEVE HEGWOOD,)
)
Defendants.)

ORDER

For the reasons stated in the court’s Memorandum Opinion of this date, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

1. On Top Communications, LLC (“On Top”), On Top Communications of Mississippi, LLC (“On Top-MS”), On Top Communications of Virginia, LLC (“On Top-VA”), On Top Communications of Louisiana, LLC (“On Top-LA”), and Steve Hegwood (“Hegwood”) (collectively, “the defendants”) and their agents, servants, and employees, and all other persons in active concert or participation with any of them, are PERMANENTLY ENJOINED from publicly performing the compositions “Be Encouraged,” “No Guarantee,” and “(You Made Me Ooh Girl) Deep,” and from causing, permitting or aiding and abetting their public performance by the radio

stations WRJH–FM, WWHV–FM, and KNOU–FM and web sites owned, operated or controlled by the defendants.

2. The defendants and their agents, servants, and employees, and all persons in active concert or participation with any of them, are PERMANENTLY ENJOINED from publicly performing any other copyrighted compositions published by Compendia Songs (“Compendia”), Jonathan Chico DeBarge, d/b/a Joseph’s Dream (“Joseph’s Dream”), Chuch Boyz Publishing (“Chuch”), DETABOB Music (“DETABOB”), Ill Thoughtz (“Ill Thoughtz”), Music of Dream Works (“Dream Works”), and Zomba Melodies, Inc. (“Zomba”) (collectively, “the plaintiffs”) without a license from SESAC, Inc. or authorization from any other source.
3. Pursuant to 17 U.S.C. § 504, judgment in the amount of \$75,000 be and is hereby ENTERED in favor of Compendia against each of the defendants.
4. Pursuant to 17 U.S.C. § 504, judgment in the amount of \$75,000 be and is hereby ENTERED in favor of Joseph’s Dream against each of the defendants.
5. Pursuant to 17 U.S.C. § 504, judgment in the amount of \$50,000 be and is hereby ENTERED in favor of Chuch, DETABOB, Ill Thoughtz, Dream Works, and Zomba against each of the defendants.
6. Pursuant to 17 U.S.C. § 505, attorneys’ fees in the amount of \$13,660 are AWARDED in favor of the plaintiffs and against the defendants.

7. Pursuant to 17 U.S.C. § 505, costs in the amount of \$290 are TAXED against the defendants.

Dated: November 15, 2004

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE