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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

Cook Productions, LLC,  
Plaintiff  
v.  
Gregory Branthley,  
Defendant

Case No.: 2:17-cv-00069-JAD-GWF

**Order Granting in Part Motion for Default Judgment**

[ECF No. 18]

9 This case is modeled after the LHF Productions and Cell Film Holdings cases—brought  
10 by the same attorney—that I ruled on,<sup>1</sup> where the plaintiffs sued many defendants under a  
11 swarm-joinder theory for separately infringing their copyright in a film by using BitTorrent  
12 software. All of these cases follow the same litigation model: the plaintiff sues several  
13 unidentified Doe defendants for separately infringing its copyright in a film by downloading and  
14 uploading it through the same BitTorrent software. Then the plaintiff moves for expedited  
15 discovery to identify the defendants, files a first-amended complaint naming them, and then  
16 systematically dismisses the claims against them after failing to serve or settling with them.<sup>2</sup>

17 Gregory Branthley is this case's sole remaining defendant, and he has failed to appear—  
18 let alone participate—in these proceedings. The Clerk of Court entered default against him on  
19 September 15, 2017,<sup>3</sup> and Cook Productions, LLC moved for default judgment two weeks later.<sup>4</sup>  
20 Eight months have passed, and Branthley continues to avoid this action. So, I grant Cook's  
21 motion in part.

22 <sup>1</sup> See, e.g., LHF Productions, Inc. v. Wilson, 2:16-cv-02368-JAD-NJK; LHF Productions, Inc. v.  
23 Kabala, 2:16-cv-02028-JAD-NJK; LHF Productions, Inc. v. Buenafe, 2:16-cv-01804-JAD-NJK;  
24 LHF Productions, Inc. v. Boughton, 2:16-cv-01918-JAD-NJK; LHF Productions, Inc. v. Smith,  
25 2:16-cv-01803-JAD-NJK; Cell Film Holdings LLC v. McCray, 2:16-cv-02089-JAD-NJK; Cell  
Film Holdings LLC v. Galang, 2:16-cv-02142-JAD-VCF; Cell Film Holdings LLC v. Acosta,  
2:16-cv-01853-JAD-VCF.

26 <sup>2</sup> See generally docket reports for the cases cited in note 1.

27 <sup>3</sup> ECF No. 17.

28 <sup>4</sup> ECF No. 18.

1 **Discussion**

2 **A. Default-judgment standard**

3 Federal Rule of Civil Procedure 55(b)(2) permits a plaintiff to obtain default judgment if  
4 the clerk previously entered default based on a defendant’s failure to defend. After entry of  
5 default, the complaint’s factual allegations are taken as true, except those relating to damages.<sup>5</sup>  
6 “[N]ecessary facts not contained in the pleadings, and claims [that] are legally insufficient, are  
7 not established by default.”<sup>6</sup> The court has the power to require a plaintiff to provide additional  
8 proof of facts or damages in order to ensure that the requested relief is appropriate.<sup>7</sup> Whether to  
9 grant a motion for default judgment lies within my discretion,<sup>8</sup> which is guided by the seven  
10 factors outlined by the Ninth Circuit in *Eitel v. McCool*:

- 11 (1) the possibility of prejudice to the plaintiff; (2) the merits of  
12 plaintiff’s substantive claim; (3) sufficiency of the complaint; (4)  
13 the sum of money at stake in the action; (5) the possibility of a  
14 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.<sup>9</sup>

15 A default judgment is generally disfavored because “[c]ases should be decided upon their merits  
16 whenever reasonably possible.”<sup>10</sup>

17 **B. The BitTorrent protocol**

18 A brief description of the BitTorrent protocol is helpful to contextualize my *Eitel*  
19 analysis. *Safety Point Products, LLC v. Does* describes it well:

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22 <sup>5</sup> *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (per curiam); FED. R.  
23 CIV. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted  
if a responsive pleading is required and the allegation is not denied.”).

24 <sup>6</sup> *Cripps v. Life Ins. Co.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

25 <sup>7</sup> See FED. R. CIV. P. 55(b)(2).

26 <sup>8</sup> *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

27 <sup>9</sup> *Id.* at 1471–72.

28 <sup>10</sup> *Id.* at 1472.

1 BitTorrent is a program that enables users to share files via the  
2 internet. Unlike other “peer-to-peer” (P2P) file sharing networks  
3 that transfer files between users or between a user and a central  
4 computer server, BitTorrent allows for decentralized file sharing  
5 between individual users who exchange small segments of a file  
6 between one another until the entire file has been downloaded by  
7 each user. Each user that either uploads or downloads a file  
8 segment is known as a “peer.” Peers that have the entire file are  
9 known as “seeds.” Other peers, known as “leeches” can  
10 simultaneously download and upload the pieces of the shared file  
11 until they have downloaded the entire file to become seeds.

8 Groups of peers that download and upload the same file during a  
9 given period are known as a “swarm,” with each peer being  
10 identified by a unique series of alphanumeric characters known as  
11 “hashtag” that is attached to each piece of the file. The swarm’s  
12 members are relatively anonymous, as each participant is  
13 identifiable only by her Internet Provider (IP) address. Overseeing  
14 and coordinating the entire process is a computer or server known  
15 as a “tracker” that maintains a record of which peers in a swarm  
16 have which files at a given time. In order to increase the likelihood  
17 of a successful download, any portion of the file downloaded by a  
18 peer is available to subsequent peers in the swarm so long as the  
19 peer remains online.

16 But BitTorrent is not one large monolith. BitTorrent is a computer  
17 protocol, used by various software programs known as “clients” to  
18 engage in electronic file-sharing. Clients are software programs  
19 that connect peers to one another and distributes data among the  
20 peers. But a peer’s involvement in a swarm does not end with a  
21 successful download. Instead, the BitTorrent client distributes data  
22 until the peer manually disconnects from the swarm. It is only  
23 then that a given peer no longer participates in a given BitTorrent  
24 swarm.<sup>11</sup>

## 22 C. Evaluating the Eitel factors

### 23 1. Possibility of prejudice to Cook

24 The first Eitel factor weighs in favor of granting default judgment against Branthley.  
25 Cook sent Branthley numerous demand letters and a summons along with the first-amended

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27 <sup>11</sup> Safety Point Products, LLC v. Does, 2013 WL 1367078, at \*1 (N.D. Ohio Apr. 4, 2013)  
28 (internal citations omitted).

1 complaint, but Branthley never responded.<sup>12</sup> Cook claims that Branthley infringed its copyright  
2 by downloading its film using BitTorrent software. Given the nature of BitTorrent software,  
3 Branthley may be exacerbating Cook’s injury by continuing to seed the file to the BitTorrent  
4 swarm.

5 **2. Substantive merits and sufficiency of the claims**

6 The second and third Eitel factors require Cook to demonstrate that it has stated a claim  
7 on which it may recover.<sup>13</sup> The first-amended complaint sufficiently pleads Cook’s direct-  
8 copyright-infringement, contributory-copyright-infringement, and vicarious-liability claims.

9 To present a prima facie case of direct infringement, Cook must show that: (1) it owns  
10 the allegedly infringed material, and (2) the alleged infringers violate at least one exclusive right  
11 granted to copyright holders under 17 U.S.C. § 106.<sup>14</sup> Cook alleges that it is the owner of the  
12 copyright registration for the film “London Has Fallen.”<sup>15</sup> Cook also alleges that Branthley  
13 willfully violated several exclusive rights granted by 17 U.S.C. § 106, and that those violations  
14 caused it to suffer damages.<sup>16</sup>

15 The contributory-copyright-infringement claim requires Cook to allege that Branthley  
16 “had knowledge of the infringing activity” and “induce[d], cause[d,] or materially contribute[d]  
17 to the infringing conduct of another.”<sup>17</sup> “Put differently, liability exists if the defendant engages  
18 in personal conduct that encourages or assists the infringement.”<sup>18</sup> Given the nature of  
19 BitTorrent technology, BitTorrent swarm participants who download files compulsorily upload

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21 <sup>12</sup> ECF No. 18 at 4.

22 <sup>13</sup> See *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

23 <sup>14</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

24 <sup>15</sup> ECF No. 9 at 10, ¶ 46; see also ECF No. 9-2.

25 <sup>16</sup> ECF No. 9 at 10–11.

26 <sup>17</sup> *A&M Records*, 239 F.3d at 1019 (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*,  
27 443 F.2d 1159, 1162 (2d Cir. 1971) and citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d  
259, 264 (9th Cir. 1996)).

28 <sup>18</sup> *Id.* (quoting *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998)).

1 those same files so that other participants may download them at a faster rate. Accordingly,  
2 Cook’s allegations that each defendant is a contributory copyright infringer because they  
3 participated in a BitTorrent swarm<sup>19</sup> is sufficient to satisfy the induced-caused-or-contributed  
4 requirement. Cook satisfies the remaining requirements by alleging that Branthley knew or  
5 should have known that other BitTorrent-swarm participants were directly infringing on Cook’s  
6 copyright by downloading the files that they each uploaded.<sup>20</sup>

7 Cook also claims that Branthley, as the account holder for the Internet service, is  
8 vicariously liable for any infringing activity conducted by other users on his internet  
9 connection.<sup>21</sup> “Vicarious infringement is a concept related to, but distinct from, contributory  
10 infringement.”<sup>22</sup> “To state a claim for vicarious copyright infringement, [Cook] must allege that  
11 [Branthley] had (1) the right and ability to supervise the infringing conduct and (2) a direct  
12 financial interest in the infringing activity.”<sup>23</sup>

13 Cook’s allegations satisfy the first prong. As the court discussed in Dallas Buyers Club,  
14 LLC v. Doughty, “the Internet service account holder, appea[rs] to have had exclusive control  
15 over use of the Internet service” and the account holder “could have simply secured access to the  
16 Internet by creating a password or by changing an already existing password.”<sup>24</sup> “Thus, . . . [the  
17 account holder] had the capacity to terminate use of his Internet service by any infringing third  
18 party if he believed it was being used to violate applicable law.”<sup>25</sup>

19 Cook also satisfies the direct-financial-interest prong. “The essential aspect of the direct  
20 financial benefit inquiry is whether there is a causal relationship between the infringing activity

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21 <sup>19</sup> ECF No. 9 at 11, ¶ 56.

22 <sup>20</sup> Id. at 12, ¶¶ 58–61.

23 <sup>21</sup> Id. at 14.

24 <sup>22</sup> *Perfect 10, Inc. v. Visa Intern. Service Ass’n*, 494 F.3d 788, 802 (9th Cir. 2007).

25 <sup>23</sup> Id.

26 <sup>24</sup> *Dallas Buyers Club, LLC v. Doughty*, 2016 WL 1690090 (D. Or. Apr. 27, 2016).

27 <sup>25</sup> Id. (citing *A&M Records*, 239 F.3d 1004).

1 and any financial benefit a defendant reaps, regardless of how substantial the benefit is in  
2 proportion to a defendant’s overall profits.”<sup>26</sup> “Financial benefit exists where the availability of  
3 infringing material acts as a ‘draw’ for customers.”<sup>27</sup> “The size of the ‘draw’ relative to a  
4 defendant’s overall business is immaterial. A defendant receives a ‘direct financial benefit’ from  
5 a third-party infringement so long as the infringement of third parties acts as a ‘draw’ for  
6 customers ‘regardless of how substantial the benefit is in proportion to a defendant’s overall  
7 profits.’”<sup>28</sup> Cook alleges that Branthley benefitted from third-party infringement by viewing “Mr.  
8 Church” without paying for it.<sup>29</sup> The law is clear that it doesn’t matter how large the financial  
9 benefit is: by watching the BitTorrent-downloaded film, Branthley saved the cost of a movie  
10 ticket, and that is a direct financial benefit.

11 I therefore find that Cook sufficiently pled each of its claims in the first-amended  
12 complaint. I also find that Cook’s claims have substantive merit, subject to any defenses that  
13 Branthley could raise.

### 14 3. Sum of money at stake

15 The sum-of-money factor requires me to consider “the amount of money at stake in  
16 relation to the seriousness of [Branthley’s] conduct.”<sup>30</sup> “If the sum of money at stake is  
17 completely disproportionate or inappropriate, default judgment is disfavored.”<sup>31</sup> Cook asks for  
18 statutory damages and attorney’s fees and costs.

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21 <sup>26</sup> Perfect 10, Inc. v. Giganews, Inc., 2014 WL 8628031, at \*3 (C.D. Cal. Nov. 14, 2014)  
22 (quoting Ellison v. Robertson, 357 F.3d 1072, 1079 (9th Cir. 2004)).

23 <sup>27</sup> A&M Records, 239 F.3d at 1023.

24 <sup>28</sup> Perfect 10, 2014 WL 8628031, at \*3 (quoting Ellison, 357 F.3d at 1079).

25 <sup>29</sup> ECF No. 9 at 13, ¶ 68.

26 <sup>30</sup> Twentieth Century Fox Film Corp. v. Streeter, 438 F. Supp. 2d 1065, 1071 (D. Ariz. 2006)  
27 (quoting PepsiCo. Inc v. California Security Cans, 238 F. Supp. 2d 1172, 1176 (C.D. Cal.  
2002)).

28 <sup>31</sup> Twentieth Century Fox, 438 F. Supp. 2d at 1071.

1 For statutory damages, Cook requests \$15,000 under 17 U.S.C. § 504(c).<sup>32</sup> The statute  
2 sets a \$750 minimum and a \$30,000 maximum award of damages for copyright infringement,<sup>33</sup>  
3 and that maximum can be increased up to \$150,000 where the infringement was willful.<sup>34</sup> I have  
4 “wide discretion in determining the amount of statutory damages to be awarded, constrained only  
5 by the specified maxima and minima.”<sup>35</sup>

6 Given Branthley’s numerous opportunities to respond to Cook’s demand letters, first-  
7 amended complaint, and this motion, coupled with Cook’s unopposed allegations that I take as  
8 true, the factual showing before me indicates that Branthley is a willful copyright infringer. But  
9 I do not find that \$15,000 is necessary to compensate Cook for its injury and to deter Branthley  
10 and other BitTorrent users. Although I acknowledge that other courts have awarded \$15,000 for  
11 the same offense, I am not persuaded by their actions. After considering the lost-profits movie  
12 ticket sales, the cost of identifying infringers and pursuing litigation, and the boundaries  
13 provided by § 504(c), I determine that \$1,500 is the appropriate damage award. This amount  
14 adequately accomplishes the goals of § 504(c) to protect copyrighted works and deter  
15 infringement. This amount is also not excessive because it is only 1% of the statutory maximum  
16 for willful infringement.

17 The Copyright Act also allows courts to award the recovery of full costs and reasonable  
18 attorney’s fees to the prevailing party as part of those costs.<sup>36</sup> Cook, in applying the lodestar  
19 method,<sup>37</sup> moves for \$2,126.25 in attorney’s fees<sup>38</sup> and \$480 in costs, for a total of \$2,606.25.

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21 <sup>32</sup> ECF No. 18 at 8.

22 <sup>33</sup> 17 U.S.C. § 504(c)(1).

23 <sup>34</sup> 17 U.S.C. § 504(c)(2).

24 <sup>35</sup> *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (quoting *Harris*  
25 *v. Emus Records Corp.*, 738 F.2d 1329, 1335 (9th Cir. 1984)).

26 <sup>36</sup> 17 U.S.C. § 505 (2012).

27 <sup>37</sup> See *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).

28 <sup>38</sup> This number is based on a rate of \$375.00 per hour for 5.67 hours.

1 The total sum of money at stake, then, is \$4,106.25, and I find that this factor weighs in favor of  
2 default judgment.

3 **4. Possibility of a dispute concerning material facts**

4 Next I consider the possibility that material facts are disputed. Cook adequately alleged  
5 three copyright-infringement claims against Branthley. Branthley failed to appear or otherwise  
6 respond, so he admitted as true all of the material facts alleged in Cook’s complaint. Because  
7 those facts are presumed true and Branthley failed to oppose this motion, no factual disputes  
8 exist that would preclude the entry of default judgment against him.

9 **5. Excusable neglect**

10 Under this factor, I consider whether Branthley’s default may have resulted from  
11 excusable neglect. Cook sent Branthley two demand letters roughly eight and five weeks prior to  
12 filing its first-amended complaint. Branthley did not respond to either of them. Then Cook filed  
13 its first-amended complaint on June 1, 2017, and sent Branthley a third demand letter. He didn’t  
14 respond to that letter either. Cook served Branthley with process on July 24, 2017,<sup>39</sup> and  
15 Branthley failed to appear or file an answer to the first-amended complaint. Three months later,  
16 Cook moved for entry of default against Branthley, and two weeks after that motion was granted,  
17 Cook moved for default judgment.<sup>40</sup> Branthley has never appeared or responded. Branthley has  
18 demonstrated a habit of ignoring Cook, so I can only conclude that his default was not the  
19 product of excusable neglect. This factor thus weighs in favor of entering default judgment.

20 **6. Favoring decisions on the merits**

21 “Generally, default judgments are disfavored because cases should be decided upon their  
22 merits whenever reasonably possible.”<sup>41</sup> Because Branthley has failed to respond to anything at  
23 all in this action, it is not possible to decide this case on its merits, so this factor, too, weighs in  
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<sup>39</sup> ECF No. 15.

27 <sup>40</sup> ECF Nos. 16, 17, 18.

28 <sup>41</sup> Eitel, 782 F.2d at 1472.



1 favor of default judgment. As every factor weighs in favor of entering default judgment, I grant  
2 Cook’s motion.

3 **D. Permanent injunction**

4 As its final claim for relief, Cook asks for a permanent injunction enjoining Branthley  
5 from “directly or indirectly infringing [its] rights” over its film “including[,] without limitation[,]  
6 using the Internet to reproduce, to distribute, to copy, or to publish the motion picture.”<sup>42</sup> The  
7 Copyright Act allows me to “grant temporary and final injunctions on such terms as [I] may  
8 deem reasonable to prevent or restrain infringement of a copyright.”<sup>43</sup> The Supreme Court held  
9 in *eBay Inc. v. MercExchange, L.L.C.* that a plaintiff must satisfy a four-factor test to receive a  
10 permanent injunction in a patent-infringement case.<sup>44</sup> Cook must demonstrate: “(1) that it has  
11 suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are  
12 inadequate to compensate for that injury; (3) that, considering the balance of hardships between  
13 the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest  
14 would not be disserved by a permanent injunction.”<sup>45</sup> This test also applies to copyright-  
15 infringement cases.<sup>46</sup>

16 Cook argues that “[m]onetary damages alone are simply inadequate” because “absent  
17 injunctive relief to force the deletion of each torrent file from [Branthley’s] computer[] . . .  
18 infringement will continue unabated in exponential fashion.”<sup>47</sup> But I conclude that a monetary  
19 judgment of \$4,106.25 is sufficient to compensate Cook for any infringement injury and likely to  
20 sufficiently deter Branthley from further infringing Cook’s copyright, so Cook fails to satisfy the  
21 second factor of the permanent-injunction test, and I deny its request for injunctive relief.

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23 <sup>42</sup> ECF No. 18 at 12.

24 <sup>43</sup> 17 U.S.C. § 502(a).

25 <sup>44</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

26 <sup>45</sup> *Id.*

27 <sup>46</sup> *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995–96 (9th Cir. 2011).


28 <sup>47</sup> ECF No. 18 at 11.

1 **Conclusion**

2 Accordingly, IT IS HEREBY ORDERED that Cook's motion for default judgment  
3 against Gregory Branthley [ECF No. 46] is **GRANTED in part and DENIED in part**. I award  
4 Cook \$1,500 in statutory damages and \$2,606.25 in reasonable attorney's fees and costs for a  
5 total of \$4,106.25. I decline to issue a permanent injunction against Branthley.

6 The **Clerk of Court** is directed to **ENTER JUDGMENT** in favor of Cook Productions,  
7 LLC and against Gregory Branthley in the total amount of \$2,606.25 and **CLOSE THIS CASE**.

8 Dated: June 1, 2018

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U.S. District Judge Jennifer A. Dorsey