

1 WO

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

BERTRAM MUSIC COMPANY, EMI )  
APRIL MUSIC INC., MUSIC SALES )  
CORP., EMI FULL KEEL MUSIC )  
CO. )

CIV 08-01099 PHX MEA

10

Plaintiffs,

11

ORDER

vs.

12

SC.GS & CO., LLC, SASHA )  
COSIC, DRAGANA COSIC, aka )  
DONNA COSIC, )

13

14

Defendants.

15

16

All of the parties have acquiesced to the exercise of  
magistrate judge jurisdiction, including the entry of final  
judgment.

17

18

19

In a decision entered September 4, 2008, the Court  
granted judgment by default in favor of Plaintiffs against  
Defendants. The Court ordered Defendants to pay statutory  
damages in the amount of \$30,000 and attorneys fees and costs in  
the amount of \$5,891.80.

20

21

22

23

24

Before the Court is Defendants' Motion to Set Aside  
Default Judgment Pursuant to F.R.C.P.60(b)(1) and (b)(6). See  
Docket No. 29. Plaintiffs filed a memorandum and affidavits in  
opposition to the motion to set aside the default judgment. See  
Docket No. 30.

25

26

27

28

1                   **Background**

2                   Plaintiffs filed a complaint on June 12, 2008, alleging  
3 Defendants were liable to Plaintiffs for copyright infringement.  
4 Plaintiffs alleged Defendants were the owners of Va Bene, a bar  
5 and restaurant located in Phoenix, Arizona. Plaintiffs alleged  
6 that Defendants allowed four copyrighted works to be performed  
7 at Va Bene on a specific date in 2007. Plaintiffs alleged they  
8 were not provided with a royalty for the performance of their  
9 copyrighted works either directly to Plaintiffs or through the  
10 payment of a license for the performance of copyrighted works to  
11 the American Society of Composers, Authors and Publishers  
12 ("ASCAP").<sup>1</sup>

13                   Significantly, Plaintiffs alleged Defendants had  
14 knowingly violated their copyrights for a period of two years.  
15 The complaint sought injunctive relief, i.e., an order  
16 prohibiting Defendants from authorizing or allowing further  
17 infringing performances of Plaintiffs' copyrighted works. The  
18 complaint also sought statutory damages pursuant to 17 U.S.C. §§  
19 502(a), 504(c) and 505, and an award of Plaintiffs' attorneys  
20 fees.

---

21  
22                   <sup>1</sup> ASCAP is a central administrator utilized by copyright owners  
23 to control licensed performance of their copyrighted works. On behalf  
24 of the copyright owners, ASCAP negotiates fee agreements, or licenses,  
25 allowing nightclubs and restaurants, *inter alia*, to play or allow the  
26 performance of the musical compositions in the ASCAP catalogue.  
27 Generally, when ASCAP determines that an establishment is playing  
28 copyrighted music the owner of the establishment is notified of the  
infringement and is offered a chance to purchase a license. See  
Broadcast Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 4-5, 99 S.  
Ct. 1551, 1554-55 (1979); International Korwin Corp. v. Kowalczyk, 855  
F.2d 375, 376 n.1 (7th Cir. 1988); Morganactive Songs v. K&M Fox Inc.,  
77 U.S.P.Q. 2d 1064, 1070 (S.D. Ind. 2005).

1           Service of the summons and complaint was executed on  
2 Defendants on June 19, 2008. See Docket No. 8. Defendants'  
3 answer to the complaint was due no later than June 30, 2008.  
4 Defendants never filed an answer to the complaint.

5           On July 16, 2008, Plaintiffs applied for the entry of  
6 Defendants' default, which was entered by the Clerk of the Court  
7 pursuant to Rule 55(a), Federal Rules of Civil Procedure, on  
8 July 30, 2008. See Docket No. 11 & Docket No. 13. On August 7,  
9 2008, Plaintiffs moved the Court for the entry of judgment in  
10 favor of Plaintiffs and against Defendants by virtue of  
11 Defendants' default in asserting any answer or defense to  
12 Plaintiffs' claims for relief, citing Rule 55(b)(2), Federal  
13 Rules of Civil Procedure. See Docket No. 14. In their motion  
14 Plaintiffs properly alleged that Defendants' infringement was  
15 willful, which allows the Court to impose a greater amount of  
16 damages.

17           Notably, in the face of judgment against them,  
18 Defendants still did not appear before the Court to assert any  
19 defense to the charges or to assert that their infringement was  
20 not willful. Accordingly, the Court concluded that it was  
21 within its discretion to authorize the statutory damages sought  
22 by Plaintiffs, i.e., \$7,500 for each of the four alleged  
23 infringements, i.e., an aggregate of statutory damages in the  
24 amount of \$30,000.

25           Judgment was entered on or about September 6, 2008.  
26 Defendants took no action after judgment was entered until they  
27 filed their motion to set aside the judgment on July 8, 2009,  
28 *ten months later*. Defendants apparently finally appeared in

1 this matter in response to Plaintiffs' filing motions for  
2 judgment debtor examinations of Defendants in an effort to  
3 effectuate the Court's award of damages.

4           **Standard for granting a motion to vacate a judgment**  
5 **pursuant to Rule 60, Federal Rules of Civil Procedure**

6           Defendants move for relief pursuant to Rule 60(b)(1)  
7 and 60(b)(6), Federal Rules of Civil Procedure, which provide:

8           Grounds for Relief from a Final Judgment,  
9           Order, or Proceeding. On motion and just  
10           terms, the court may relieve a party or its  
11           legal representative from a final judgment,  
12           order, or proceeding for the following  
13           reasons:

14           (1) mistake, inadvertence, surprise, or  
15           excusable neglect;

16           \*\*\*

17           6) any other reason that justifies relief.

18           See also Fed. R. Civ. P. 55(c) (allowing the Court to set aside  
19 a default judgment "in accordance with" Federal Rule of Civil  
20 Procedure 60(b)); S.E.C. v. Internet Solutions for Bus. Inc.,  
21 509 F.3d 1161, 1164-65 (9th Cir. 2007).

22           A motion under Rule 60(b)(1) must be made within a  
23 "reasonable" time, and not more than one year after judgment was  
24 entered. The Court finds that, given the circumstances of this  
25 case, Defendants' motion to set aside judgment by default is not  
26 timely because ten months after the judgment was entered is not  
27 a "reasonable" time.

28           The Court also finds Defendants are not eligible for  
relief from judgment pursuant to Rule 60(b)(1) because there is  
no evidence of mistake, inadvertence, surprise, or excusable  
neglect. Defendants are also not entitled to relief from  
judgment based on Rule 60(b)(6). Rule 60(b)(6), the "catch-all"

1 provision that allows relief for a reason not specified in Rule  
2 60 subsections (b)(1) through (5), should only be applied in  
3 extraordinary circumstances. See, e.g., Shoen v. Shoen, 933 F.  
4 Supp. 871, 875 (D. Ariz. 1996). Defendants have not  
5 demonstrated extraordinary circumstances.

6           The rule also comports with general  
7 principles of fairness. ... The defendant who  
8 chooses not to put the plaintiff to its  
9 proof, but instead allows default judgment to  
10 be entered and waits, for whatever reason,  
11 until a later time to challenge the  
12 plaintiff's action, should have to bear the  
13 consequences of such delay.

14 S.E.C. v. Internet Solutions for Bus. Inc., 509 F.3d at 1166.

15           When determining whether to exercise its discretion to  
16 reverse a judgment by default, the Court should consider whether  
17 the defendant's culpable conduct led to the default; whether the  
18 defendant has a meritorious defense; and whether reopening the  
19 default judgment would prejudice the plaintiff. See, e.g., TCI  
20 Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir.  
21 2001). Defendants bear the burden of demonstrating that these  
22 factors favor vacating the judgment. See id.; Cassidy v.  
23 Tenorio, 856 F.2d 1412, 1415 (9th Cir. 1988). Where a defendant  
24 has intentionally and repeatedly disregarded court orders the  
25 Court does not abuse its discretion by denying a motion to set  
26 aside judgment by default. See Yusov v. Yusuf, 892 F.2d 784,  
27 787 (9th Cir. 1989).

28           Defendants do not assert that they had no notice of the  
suit, or the application for entry of default, or the  
application for the entry of judgment by default, or the entry  
of judgment by default. Still, Defendants chose not to appear

1 and defend in this matter. The civil docket reflects that  
2 Defendants chose not to defend this matter until it became clear  
3 that Plaintiffs intended to collect the judgment by servicing  
4 notice of judgment debtor exams.

5 Defendants' conduct was culpable. "If a defendant has  
6 received actual or constructive notice of the filing of the  
7 action and failed to answer, its conduct is culpable."  
8 Franchise Holding II, LLC. v. Huntington Rest. Group, Inc. 375  
9 F.3d 922, 926 (9th Cir. 2004).

10 Plaintiffs will clearly be prejudiced if the judgment  
11 is set aside. Plaintiffs would be forced to re-litigate a  
12 matter to which Defendants have not proffered a meritorious  
13 defense and, accordingly, greater expense of both Plaintiffs'  
14 and judicial resources would be expended to the same eventual  
15 outcome.

16 Defendants do not argue that they did not violate  
17 Plaintiffs' copyrights, but instead contend the amount of  
18 damages was not warranted.<sup>2</sup> Defendants' primary argument is that

---

19  
20 <sup>2</sup> Defendants' beliefs as to whether they or the performers are  
21 responsible for paying for use of copyrighted materials are not a legitimate  
22 defense to a charge of infringement. It is well established that the owner  
23 and operator of an establishment is liable for copyright infringement which  
24 occurs at their establishment. See Leigh v. Sakkaris, 215 U.S.P.Q. 113  
(N.D. Cal. 1982); Van Halen Music v. Palmer, 626 F. Supp. 1528 (D. Ark.  
25 1985). Neither can a business owner avoid liability for copyright  
26 infringement at their establishment by "hiding [their] head in the sand like  
27 an ostrich" and ignoring warnings about infringement. See Chi-Boy Music v.  
28 Charlie Club, Inc., 930 F.2d 1224 (7th Cir. 1991).

The Court is absolutely not persuaded that Mr. Cosic's purported  
deficits in understanding the English language and the legal implications  
of his actions are as limiting as Defendants assert. Furthermore, even if  
true, Mr. Cosic's language difficulties are not a defense to the charges of  
infringement. Defendants appear to have received or had access to legal  
advice since the onset of this litigation and, accordingly, ignorance poses  
no excuse for their lack of diligence in presenting any defense to the  
complaint.

1 the amount of damages is unrealistic and unfair in light of the  
2 actual number and type of copyright violations. Defendants also  
3 contend that the Court looked only at Plaintiff's complaint when  
4 determining the amount of damages to award.

5 Defendants have provided no meritorious defenses to  
6 Plaintiffs' charges of copyright infringement. Plaintiffs have  
7 produced evidence that Defendants had repeated notice not only  
8 of this lawsuit, but also of their many acts of copyright  
9 infringement.

10 Douglas Jones, ASCAP's Litigation  
11 Administrator, beginning in July 2005, ASCAP  
12 contacted Defendants dozens of times, by  
13 correspondence, telephone calls and personal  
14 visits, to offer Defendants a license for  
15 their establishment, Va Bene Restaurant [ ] As  
16 part of these contacts, ASCAP repeatedly  
17 explained to Defendants that under the United  
18 States Copyright Law they needed to obtain  
19 authorization to perform publicly copyrighted  
20 songs in the ASCAP repertory. *In fact, the  
21 letters to Defendants specifically informed  
22 them that unauthorized performances of  
23 copyrighted musical works in the ASCAP  
24 repertory constituted copyright infringement  
25 and that Defendants could be liable for  
26 damages ranging from \$750 to \$30,000 for each  
27 song they infringed.* (Jones Aff. Exhibit A;  
28 letters dated September 26, 2006; October 2,  
2006; March 14, 2007; and July 19, 2007).

21 Docket No. at 5.

22 When determining the amount of damages to award  
23 Plaintiffs upon Defendants' default, the Court considered  
24 whether Defendants willfully violated Plaintiffs' copyrights.  
25 The determination of whether a violation is willful is a  
26 decision within the discretion of the Court. See, e.g., Cass  
27 County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 641 (8th Cir.  
28 1996); Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1229

1 (7th Cir. 1991). The finding that the infringement was willful  
2 allowed the Court to award damages in the amount of up to  
3 \$150,000 per infringement. See Cass County Music Co., 88 F.3d  
4 at 641; 17 U.S.C. § 504(c)(2) (2005 & Supp. 2008).

5 Infringement is "willful" if the defendants knew their  
6 conduct constituted an infringement of a copyright or if they  
7 acted in "reckless disregard" of copyrights. See Wildlife Exp.  
8 Corp. v. Carol Wright Sales, Inc., 18 F.3d 502, 511 (7th Cir.  
9 1994). In making this determination the Court was allowed to  
10 consider as a "persuasive" factor whether Defendants had notice  
11 that their acts constituted infringement. See Cass County Music  
12 Co., 88 F.3d at 637-38; Chi-Boy Music, 930 F.2d at 1227-28;  
13 Morganactive Songs v. K&M Fox Inc., 77 U.S.P.Q. 2d 1064, 1069-70  
14 (S.D. Ind. 2005).

15 Contrary to Defendants' statement that the Court did  
16 not look beyond the complaint to assess the amount of damages to  
17 award, the Court assessed the amount of damages per infringement  
18 after examining the entire record, including the affidavits  
19 attached to the motion for judgment by default. Defendants were  
20 served with the motion for judgment by default and could have,  
21 but did not, challenge any of the evidence provided therein  
22 going toward a determination of the amount of damages.

#### 23 **IV Conclusion**

24 Defendants' motion to set aside judgment by default is  
25 not timely, as it was filed ten months after judgment was  
26 entered and Defendants offer no legitimate reason for excusing  
27 their lack of diligence in asserting any potential defenses to  
28 Plaintiffs' claims even after judgment was entered.



1 Additionally, Defendants have not met the requirements of either  
2 subsection (b)(1) or (b)(6) of Rule 60, Federal Rules of Civil  
3 Procedure, regarding the setting aside of a judgment and,  
4 accordingly, setting aside the judgment by default is not  
5 warranted pursuant to Rule 55, Federal Rules of Civil Procedure.  
6 Defendants have not met their burden of establishing good cause  
7 for their default and have not established that the Court erred  
8 in finding their infringement of Plaintiffs' copyrights willful  
9 and in assessing the amount of damages awarded Plaintiffs.

10

11 **IT IS ORDERED that** Defendants' motion [Docket No. 29]  
12 to set aside judgment is **denied**.


13

DATED this 27<sup>th</sup> day of July, 2009.

14

15

16

  
\_\_\_\_\_  
Mark E. Aspey  
United States Magistrate Judge

17

18

19

20

21

22

23

24

25

26

27

28