

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

WB Music Corp.; Basement Boys Music,
Inc.; C-Water Publishing, Inc.; Fifty-Six
Hope Road Music Limited; Odnil Music
Limited; Hudmar Publishing Co., Inc., and
Rising Storm Music,

No. CV-09-1528-PHX-LOA

12

Plaintiffs,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND REPORT AND
RECOMMENDATION**

13

vs.

14

South Beach Restaurant, Inc., an Arizona
corporation; Fran Tsikitas and Jane Doe
Tsikitis, his wife; Mario Rana and Angela
Rana, husband and wife,

16

Defendants.

17

18

19

A default damages hearing was held on November 25, 2009 as a result of the entries of default against Defendants South Beach Restaurant, Inc., an Arizona corporation; Fran Tsikitas and Jane Doe Tsikitis, husband and wife; Mario Rana and Angela Rana, husband and wife, on Plaintiffs' Complaint. (docket ## 14, 16, 18) Pursuant to Fed.R.Civ.P. 52(a), the Court enters its findings of fact and conclusions of law hereinafter.

23

I. Jurisdiction

24

25

This District Court has subject-matter jurisdiction over this lawsuit pursuant to 28 U.S.C. §§ 1331, 1338. *Scholastic Entm't, Inc. v. Fox Entm't Group, Inc.*, 336 F.3d 982, 986 (9th Cir. 2003) (“[A]n action ‘arises under’ the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement . . .”).

26

27

28

1 This action is authorized by the Copyright Act, Title 17, U.S.C. §§ 101 etc. (docket # 1)
2 Venue is proper in this District Court pursuant to 28 U.S.C. § 1391(a).

3 Plaintiffs have consented in writing to magistrate-judge jurisdiction
4 pursuant to 28 U.S.C. § 636(c)(1). (docket # 8) Arguably, this Magistrate Judge has
5 jurisdiction to conduct this hearing and enter final judgment over Defendants even though
6 they have not consented because they are technically not parties by failing to appear in
7 this action. *United States v. Real Property*, 135 F.3d 1312 (9th Cir. 1998); *United States*
8 *v. 8136 S. Dobson Street*, 125 F.3d 1076 (7th Cir.1997); *EEOC v. West Louisiana Health*
9 *Svcs., Inc.*, 959 F.2d 1277, 1279-80 (5th Cir. 1992); *Giove v. Stanko*, 882 F.2d 1316, 1318
10 (8th Cir. 1989). Because the Ninth Circuit has not expressly addressed this issue, and the
11 Eighth Circuit has found to the contrary, the undersigned will proceed by Report and
12 Recommendation to the Phoenix Presiding District Judge for December, 2009, the
13 Honorable Susan R. Bolton. See, *Henry v. Tri-Services, Inc.*, 33 F.3d 931, 932 (8th
14 Cir.1994) (“We hold that the magistrate judge lacked authority to enter final judgment
15 because [the defaulted party] did not consent to have the matter tried to the magistrate
16 judge.”)

17 **II. Background**

18 The Complaint was filed on July 23, 2009 and served upon the Defendants
19 in early August 2009. (docket ## 1, 9, 10, 15, 17) No Answer or other responsive
20 pleading has been filed by, or on behalf of, Defendants, or any of them, and the time for
21 filing a responsive pleading has elapsed. Defendants’ defaults were duly entered by the
22 Clerk of the Court. (docket ## 14, 16, 18) In an effort to provide notice to Defendants,
23 the default damages hearing was continued from October 23, 2009 to November 25, 2009
24 in order that Plaintiffs’ Motion for Default Judgment and its attachments could be mailed
25 to Defendants’ last-known addresses. (docket ## 26-27) These documents were timely
26 mailed to Defendants. (docket # 28; Affidavit of Mailing) There is no reason to believe
27 that any Defendant is in the military service, is an infant or is an incompetent person.

28 This is a copyright infringement action arising out of the unauthorized

1 public performances of four (4) copyrighted songs on September 5, 2008, at South Beach
2 Restaurant & Lounge, located at 9343 E. Shea Blvd., # 135, Scottsdale, Arizona.
3 Plaintiffs are the owners of the copyrights to these songs and seek the remedies provided
4 by the United States' Copyright Laws, §§ 502(a), 504(c), and 505, including an injunction
5 prohibiting further infringing performances on copyrighted musical compositions;
6 statutory damages in an appropriate amount for each infringement; and costs, including
7 reasonable attorney's fees.

8 Plaintiffs are members of the American Society of Composers, Authors and
9 Publishers ("ASCAP"). ASCAP has been granted a non-exclusive right to license non-
10 dramatic public performances of Plaintiffs' copyrighted musical compositions. On behalf
11 of Plaintiffs, and all of its members, ASCAP licenses thousands of radio and television
12 stations, restaurants, nightclubs, hotels, taverns, and other establishments whose owners
13 desire to lawfully perform the copyrighted musical compositions in the ASCAP
14 repertoire. (docket # 27 at 2) As Plaintiffs' representative, and with their express consent
15 to do so, ASCAP has standing to initiate and prosecute this lawsuit.

16 Occasionally, users decline ASCAP's offer of a license agreement and
17 choose instead to perform copyrighted works without permission from the copyright
18 owners. Consequently, they become infringers under the Copyright Laws, 17 U.S.C. §§
19 101 *et. seq.* When this occurs, ASCAP members institute copyright infringement actions.
20 The affidavit of Douglas Jones, Manager of Litigation Services for ASCAP's General
21 Licensing Department, docket # 27 at 1, establishes that Defendants had actual
22 knowledge that they were not licensed to perform copyrighted musical compositions in
23 the ASCAP repertoire; and that the unauthorized performances of Plaintiffs and other
24 ASCAP's members' songs constitute copyright infringements. In spite of this knowledge,
25 Defendants intentionally performed ASCAP's copyrighted music for over 18 months.
26 See, Affidavit of Douglas Jones. (docket # 27 at 12-13)

27 **III. Findings of Fact**

28 The Court makes the following findings of fact:

1 1. The Complaint was filed on July 23, 2009, and was served upon
2 Defendants during the first week of August 2009.

3 2. No Answer or other responsive pleading has been filed by any of these
4 Defendants, and the time for filing a responsive pleading has elapsed.

5 3. There is no reason to believe that any individual Defendant is in the
6 military service, is an infant or an incompetent person.

7 4. Four (4) copyrighted songs were publicly performed, without
8 authorization, on September 5, 2008 at South Beach Restaurant & Lounge, 9343 E. Shea
9 Blvd., #135, Scottsdale, Arizona.

10 5. Plaintiffs are the owners of the copyrights to the songs listed in the
11 Complaint, and seek the remedies provided by the United States' Copyright Laws, 17
12 U.S.C. §§ 502(a), 504(c), and 505, including an injunction prohibiting further infringing
13 performances of the musical compositions in question; statutory damages in an
14 appropriate amount for each infringement; and costs, including reasonable attorney's fees.

15 6. Plaintiffs are members of the American Society of Composers, Authors
16 and Publishers ("ASCAP") which has been granted a non-exclusive right to license
17 non-dramatic public performances of Plaintiffs' copyrighted musical compositions.

18 7. On behalf of Plaintiffs and all of its members, ASCAP licenses thousands
19 of radio and television stations, restaurants, nightclubs, hotels, taverns, and other
20 establishments whose owners desire to lawfully perform the copyrighted musical
21 compositions in the ASCAP repertoire.

22 8. Defendants declined ASCAP's offer of a license agreement and chose
23 instead to unlawfully perform the copyrighted works listed in the Complaint without
24 permission from the copyright owners. In fact, ASCAP, through its agents and attorney,
25 contacted Defendants 21 times prior to filing this action in an effort to inform Defendants
26 of their copyright violations, their need for appropriate licensing, and that a lawsuit would
27 follow absent their compliance. Neither Defendants, nor an attorney on their behalf,
28 contacted or responded to Plaintiffs' efforts to resolve the copyright violations outside of

1 litigation. (See, sworn testimony of Douglas Jones on November 25, 2009)

2 9. The affidavit of ASCAP's Douglas Jones, docket # 27, and its exhibits
3 attached thereto, establish that Defendants had actual knowledge that they were not
4 licensed to perform copyrighted musical compositions in the ASCAP repertoire and that
5 Defendants' unauthorized performances of Plaintiffs' and other ASCAP's members'
6 songs constitute copyright infringement.

7 10. Beginning on February 6, 2008, ASCAP made numerous efforts to
8 persuade Defendants to obtain an ASCAP license, including 21 contacts with Defendants
9 - by personal visits to the establishment, letters from ASCAP to Defendants and telephone
10 calls to Defendants. As a result, Defendants have been repeatedly advised that
11 permission must be obtained either from ASCAP or the individual copyright owners to
12 perform ASCAP members' copyrighted music at South Beach Restaurant & Lounge. To
13 date, Defendants have not obtained an ASCAP license from ASCAP members to perform
14 their songs at South Beach Restaurant & Lounge. Instead, Defendants have deliberately
15 violated copyright laws by publicly performing ASCAP's members' music on a regular
16 basis at the South Beach Restaurant.

17 11. In spite of actual knowledge that they must be properly licensed,
18 Defendants intentionally performed, and, on information and belief, continue to perform
19 ASCAP's members' copyrighted music from, at least, as early as February 6, 2008,
20 through September 5, 2008, to the present time, a period of over 18 months.

21 12. In 2008, ASCAP arranged for an independent investigator to visit
22 Defendants' establishment to determine if Defendants were publicly performing
23 ASCAP's members' music. On the night of September 5, 2008, the investigator, Kevin
24 McDonough, acting in an undercover capacity, visited South Beach Restaurant & Lounge
25 and, made contemporaneous notes of the songs he heard performed. The songs Mr.
26 McDonough heard performed at South Beach Restaurant & Lounge that night were
27 "GONNA MAKE YOU SWEAT, a/k/a EVERYBODY DANCE NOW"; "GYPSY
28 WOMAN (SHE'S HOMELESS)"; "COULD YOU BE LOVED"; and, "AFRICA."

1 These unauthorized performances constitute the basis for this infringement action filed by
2 ASCAP's members against Defendants. (See, affidavit of ASCAP's Douglas Jones,
3 docket # 27 at 3-4 and Exhibit A thereto) Plaintiffs own the copyrights to these musical
4 compositions.

5 13. During the relevant period, Defendants owned and operated the South
6 Beach Restaurant & Lounge, and play copyrighted music at this location without proper
7 ASCAP licensing.

8 14. Plaintiffs are entitled to an injunction, prohibiting further infringing
9 performances of ASCAP's members' copyrighted music.

10 15. Had Defendants' restaurant been properly licensed with ASCAP,
11 Defendants would have paid \$3,345.88 in licensing fees between February 1, 2008 and
12 December 31, 2009. The current annual licensing rate is \$1,839.50.

13 15. Defendants are knowing and willful infringers, having been notified by
14 ASCAP's representatives on numerous occasions (at least, 21 times) of their need to
15 license the performances of copyrighted musical compositions.

16 **IV. Default Judgment Analysis**

17 Because the Complaint seeks non-liquidated damages and injunctive relief
18 that were not "for a sum certain or a sum that [could] be made certain by computation"
19 within the meaning of Rule 55(b), FED.R.CIV.P., the Court conducted an on-the-record
20 Rule 55(b)(2) default damages hearing on November 25, 2009.

21 Following entry of default, Rule 55(b)(2), FED.R.CIV.P., permits a district
22 court to enter final judgment in a case. Entry of default judgment, however, is not a
23 matter of right. *Warner Bros. Entm't Inc. v. Caridi*, 346 F.Supp.2d 1068, 1071 (C.D. Cal.
24 2004). Entry of default judgment is entirely within a district or magistrate judge's
25 discretion and may be refused if the judge determines no justifiable claim has been
26 alleged or that a default judgment is inappropriate for other reasons. *Draper v. Coombs*,
27 792 F.2d 915, 924 (9th Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th
28 Cir.1980)). Well-pleaded factual allegations of the complaint are taken as true, except for

1 those allegations relating to damages. *Philip Morris USA, Inc. v. Castworld Prods., Inc.*,
2 219 F.R.D. 494, 498 (C.D. Cal. 2003) (citing *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d
3 915, 917 (9th Cir. 1987)); *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir.
4 1977).

5 The Ninth Circuit has enumerated seven factors for a district court to
6 consider in determining whether to grant a default judgment: (1) the merits of the
7 plaintiff's substantive claim; (2) the sufficiency of the complaint; (3) the sum of money at
8 stake in the action; (4) the possibility of prejudice to the plaintiff; (5) the possibility of a
9 dispute concerning material facts; (6) whether the default was due to excusable neglect;
10 and (7) the strong policy underlying the Federal Rules of Civil Procedure, favoring a
11 decision on the merits. *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986); *Truong Giany*
12 *Corp. v. Twinstar Tea Corp.*, 2007 WL 1545173 (N.D. Cal. 2007). After considering and
13 balancing all these factors, the undersigned finds that the factors strongly weigh in favor
14 in entering the default judgment recommended herein.

15 **V. Conclusions of Law**

16 The Court makes the following conclusions of law:

17 1. That Plaintiffs are the copyright owners of the musical compositions
18 which are the subject matter of this case and which were wrongfully performed in
19 violation of Plaintiffs' copyrights by Defendants, South Beach Restaurant, Inc.; Frank
20 Tsikitis; his wife, Jane Doe Tsikitis; Angela Rana; and Mario Rana at South Beach
21 Restaurant & Lounge on September 5, 2008, in violation of Plaintiffs' rights under Title
22 17 U.S.C. §§ 101 *et seq.*

23 2. That Defendant South Beach Restaurant, Inc., at all times pertinent
24 hereto, and specifically on September 5, 2008, did own, control, manage, operate and
25 maintain for public entertainment, accommodation, amusement and refreshment, all
26 facets, including the music policy of the establishment known as South Beach Restaurant
27 & Lounge, located at 9343 E. Shea Blvd. in Scottsdale, Arizona.

28 3. That Defendants, Frank Tsikitis and Jane Doe Tsikitis; and Mario and

1 Angela Rana, are each husband and wife, respectively, and citizens of the District of
2 Arizona. That Frank Tsikitis, Mario Rana and Angela Rana are officers, directors and
3 shareholders of South Beach Restaurant, Inc., and shared jointly the responsibility for the
4 control, management, operation and maintenance of its corporate affairs, including its
5 music policy. That the Ranas and Tsikitises derive financial benefit from the operations
6 of South Beach Restaurant & Lounge by South Beach Restaurant, Inc., both personally
7 and for their marital community.

8 4. That Plaintiffs and their predecessors-in-interest complied in all respects
9 with Title 17, U.S.C. §§ 101 *et seq.*, and have now, and at the time of the infringements on
10 September 5, 2008, the exclusive rights and privileges in and to the copyright of each
11 musical composition named herein.

12 5. That the musical compositions identified herein have been properly
13 registered with the United States Government and the Register of Copyrights. Plaintiffs
14 hold certificates of registration and renewal, where applicable, in and to these musical
15 compositions.

16 6. That the infringements which occurred at the South Beach Restaurant &
17 Lounge on September 5, 2008, were done knowingly and willfully by Defendants.

18 7. That individual Defendants are vicariously liable for infringements by the
19 corporate Defendant.

20 8. That Defendants and the South Beach Restaurant & Lounge were not,
21 and are not, currently licensed to perform Plaintiffs' copyrighted music, and, upon
22 information and belief, copyright infringements continue to occur at the South Beach
23 Restaurant & Lounge in violation of the rights of members of the American Society of
24 Composers, Authors & Publishers, thereby entitling Plaintiffs to an injunction against
25 Defendants, prohibiting future unauthorized performances of copyrighted musical
26 compositions.

27 9. That Plaintiffs are entitled to injunctive relief, monetary damages, and an
28 award of reasonable attorney's fees and costs, against Defendants South Beach

1 Restaurant, Inc.; Frank Tsikitis and his wife, Jane Doe Tsikitis; Angela and Mario Rana,
2 husband and wife, jointly and severally.

3 10. Defendants' unlawful conduct has resulted in a "profit" to Defendants in
4 the approximate sum of \$3,345.88, an amount South Beach Restaurant & Lounge would
5 have had to pay to be properly licensed by ASCAP from February 1, 2008 through
6 December 31, 2009. (The applicable license fee for 2009 is \$1,839.50). In addition,
7 Defendants' unlawful conduct required ASCAP to incur \$247.34 in out-of-pocket
8 expenses, representing the cost of obtaining the evidence of the infringements on which
9 this action is based and evidence that the infringing conduct has continued, plus the
10 expense of lawyers, court and other costs.

11 11. Defendants have been, and upon information and belief are, knowing
12 and deliberate infringers. Since, at least, February 6, 2008, Defendants have been well
13 aware of the need for permission and appropriate licensing to perform copyrighted music
14 in the ASCAP repertoire; have consistently furnished musical entertainment for their
15 patrons; and yet, for over 18 months since ASCAP first contacted them regarding a
16 license agreement, Defendants have neither obtained the appropriate license nor obtained
17 permission from the copyright owners to publicly perform their copyrighted works.

18 12. As knowing, deliberate and continuing copyright infringers, Defendants
19 should not be better off as violators of the Copyright Laws than they would have been had
20 they properly complied with applicable licensing requirements. Because of the
21 aggravated nature of Defendants' copyright infringements, their blatant disregard of
22 federal copyright laws, and ASCAP's numerous attempts to obtain Defendants'
23 cooperation and licensing outside of litigation, Plaintiffs are entitled to an award of
24 statutory damages of \$7,500.00 per infringement ($\$7,500.00 \times 4$ copyrighted songs =
25 \$30,000.00 in the aggregate). A \$30,000.00 award is fair and just to reasonably
26 compensate Plaintiffs for the copyright violations of their music but is not greater than
27 necessary to deter Defendants from future deliberate infringement of Plaintiffs' and other
28

1 ASCAP members' copyrighted music.¹

2 13. Pursuant to 17 U.S.C. § 505, Plaintiffs are entitled to recover the
3 following reasonable amounts:

4 (1) attorney's fees in the amount of \$5,890.00 (\$5,415.00 plus \$475.00 for
5 one hour incurred on the date of the default damages hearing) based on counsel's billing
6 rate of \$475.00 per hour actually billed to ASCAP for a total of 12.40 hours. The fee
7 agreement between Snell & Wilmer law firm and ASCAP is oral and has been for several
8 years. It results in quarterly billings of hourly-based rates and reimbursement of costs
9 actually expended. Plaintiffs' counsel's \$475.00 hourly rate is reasonable because (a)
10 Peter J. Rathwell, Plaintiffs' principal attorney with Snell & Wilmer, has been licensed by
11 the State Bar of Arizona since 1968 (41 years); (b) has extensive experience in handling
12 copyright litigation; and (c) has represented ASCAP since approximately 1974, a period
13 of approximately 35 years. (See, Attorney's Fees Affidavit, docket # 26-2 at 5-8)

14 (2) taxable costs in the amount of \$654.40, docket # 26-2 at 8; and

15 (3) non-taxable expenses in the amount of \$247.34.

16 Accordingly,

17 **IT IS RECOMMENDED** as follows:

18 1. Plaintiffs' Motion for Default Judgment, docket # 26, be **GRANTED**;

19 2. Plaintiffs' Application for Attorney's Fees and Costs, docket # 24, be
20 **GRANTED**;

21 3. Plaintiffs' first Motion for Default Judgment, docket # 22, be **DENIED**
22 as moot;

23 4. Judgment be entered in favor of Plaintiffs and against Defendants South
24 Beach Restaurant, Inc.; Frank Tsikitis and Jane Doe Tsikitis, his wife; Mario Rana and
25 Angela Rana, and each of them, jointly and severally, as follows:

26 _____
27 ¹ For a comparison of other copyright infringement awards in the District of Arizona,
28 Phoenix division, see docket # 26-2 at 2-3.

1 a.) in the amount of \$30,000.00, with interest thereon at the annual rate of
2 _____% from the date of entry of this Judgment, until paid in full; together with
3 reasonable attorney's fees and taxable costs in the amount of \$6,818.74, and non-taxable
4 costs in the amount of \$247.34. (See, proposed Judgment, docket # 22-1, lodged on
5 October 22, 2009)

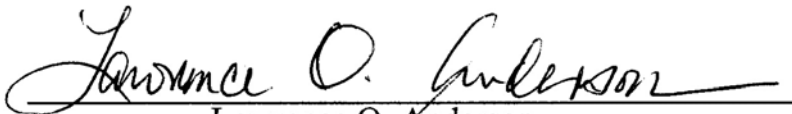
6 b.) that Defendants, jointly and severally, and all persons acting under the
7 direction, control, permission and authority of Defendants, be enjoined and restrained
8 permanently from publicly performing, and for causing them or permitting them to be
9 publicly performed, by Defendants South Beach Restaurant, Inc.; Frank Tsikitis and Jane
10 Doe Tsikitis, his wife; Mario Rana and Angela Rana, or in any place owned, controlled or
11 conducted by them, and from aiding and abetting the public performance of any copy-
12 righted musical works in the ASCAP repertory without permission obtained from ASCAP
13 or directly from the copyright owner.

14 This recommendation is not an order that is immediately appealable to the
15 Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal
16 Rules of Appellate Procedure, should not be filed until entry of the District Court's
17 judgment. The parties shall have 14 days from the date of service of a copy of this
18 recommendation within which to file specific written objections with the Court. *See*, 28
19 U.S.C. § 636(b)(1), as amended on December 1, 2009²; Rules 72 and 6, Federal Rules of
20 Civil Procedure, as amended on December 1, 2009. Thereafter, the parties have seven (7)
21 days within which to file a response to the objections. Failure to timely file objections to
22 the Magistrate Judge's Report and Recommendation may result in the acceptance of the
23 Report and Recommendation by the District Judge without further review. *See, United*
24 *States v. Reyna- Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file
25 objections to any factual determinations of the Magistrate Judge will be considered a
26 waiver of a party's right to appellate review of the findings of fact in an order or judgment
27

28 ² See, Statutory Time-Periods Technical Amendments Act of 2009. H.R. 1626.

1 entered pursuant to the Magistrate Judge's recommendation. *See*, Rule 72, Federal Rules
2 of Civil Procedure.

3 Dated this 1st day of December, 2009.

4
5 

6 Lawrence O. Anderson
7 United States Magistrate Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28