

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Broadcast Music, Inc.; EMI Blackwood Music Inc.; Cotillion Music, Inc.; Mary Bono as Trustee of the Bono Collection Trust; House of Cash, Inc.; Songs of Universal, Inc.; Lisa Anne Loeb d/b/a Furious Rose Music; Robert Kuykendall; Richard A. Ream; Bruce Johannesson and Bret M. Sychak, a partnership d/b/a Cyanide Publishing; Bradley Kirk Arnold; Robert Todd Harrell; Matthew Darrick Roberts and Christopher Lee Henderson, a partnership d/b/a Escatawpa Songs; Sony/ATV Songs LLC; Jesse Harris, an individual d/b/a Beanly Songs; Embassy Music Corporation; Reynsong Publishing Corp.; Jon Randall Stewart, an individual d/b/a WHA YA SAY Music; Sony/ATV Songs LLC d/b/a Sony/ATV Tree Publishing; Mr. Bubba Music, Inc.; Hinder Music Co., a Division of Hinder Publishing LLC; Universal Music MGB NA LLC d/b/a Universal Music Careers; Christopher A. Daughtry, an individual d/b/a Surface Pretty Deep Ugly Music,)

No. CV 09-8131-PCT-JAT

10

ORDER

11

12

13

14

15

16

17

18

19

20

21

Plaintiffs,)

22

vs.)

23

24

TLM Investments, P.L.C. d/b/a Outpost Saloon and Linda A. McFarlin a/k/a Linda McFarlin Miller and Timothy J. Miller, each individually,)

26

Defendants.)

27

28

1 Pending before the Court is Plaintiffs' Motion for Summary Judgment (Doc. #26),
2 Motion for Summary Disposition (Doc. #28) and their Memorandum in Support of Costs and
3 Attorneys' Fees (Doc. #29). Defendants did not file a response to any of Plaintiffs'
4 aforementioned motions. For the reasons cited herein, the Court denies Plaintiffs' Motion
5 for Summary Disposition, grants Plaintiffs' Motion for Summary Judgment, awards Plaintiffs
6 costs and attorneys' fees and orders a permanent injunction against Defendants from further
7 infringement of works within the BMI repertoire.

8 **I. Background**

9 Plaintiffs filed a Motion for Summary Judgment on March 10, 2010. (Doc. #26).
10 Along with their Motion, Plaintiffs filed a separate Statement of Facts in Support. (Doc.
11 #27). Defendants have not filed a response to the Motion. The Court therefore accepts
12 Plaintiffs' undisputed facts as true. L.R. Civ. P. 56.1(b).

13 Individually named Plaintiffs are the copyright owners of various musical
14 compositions that are the subject of the pending litigation. (Doc. #26 at 2). Plaintiffs each
15 own the exclusive right to authorize public performances of their works. (*Id.*). See 17 U.S.C.
16 § 106(4).¹

17 Plaintiff Broadcast Music, Inc. ("BMI") operates as a non-profit performing rights
18 organization that licenses the right to publicly perform copyrighted musical compositions on
19 behalf of copyright owners. (Doc. #26 at 1-2). The collection of musical compositions that
20 BMI licenses is known as the "BMI repertoire." (Doc. #26 at 2). Through agreements with

21
22 ¹"The owner of copyright under this title has the exclusive rights to do and to
23 authorize any of the following: (1) to reproduce the copyrighted work in copies or
24 phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to
25 distribute copies or phonorecords of the copyrighted work to the public by sale or other
26 transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical,
27 dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual
28 works, to perform the copyrighted work publicly; (5) in the case of literary, musical,
dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works,
including the individual images of a motion picture or other audiovisual work, to display the
copyrighted work publicly; and (6) in the case of sound recordings, to perform the
copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106(4)

1 copyright owners, such as the individually named Plaintiffs, BMI acquires non-exclusive
2 public performance rights. (*Id.*). BMI has acquired such rights from each of the other
3 Plaintiffs in this action. (*Id.*).

4 In turn, BMI grants music users such as broadcasters, owners and operators of concert
5 halls, restaurants, nightclubs, and hotels, the right to publicly perform any of the works in the
6 BMI repertoire by means of “blanket license agreements.” (*Id.*). Any money collected from
7 the blanket license agreements is distributed as royalties to its affiliated publishers and
8 composers, after a deduction of operating expenses and reasonable reserves. (*Id.*).

9 The twelve songs that are the subject of the present action, are registered by BMI with
10 the Copyright office.² (Doc. #26, p. 3). BMI holds and has held the non-exclusive right to
11 issue licenses to publicly perform those twelve songs. (*Id.*).

12 BMI alleges that Defendants infringed upon the twelve songs at 8172 East Long Mesa
13 Drive, Suite B, in Prescott Valley, Arizona (“Outpost Saloon”). (Doc. #26, at 2, 5).
14 Defendant TLM Enterprises, P.L.C. (“TLM”) owns and operates the Outpost Saloon. (Doc.
15 #26 at 2). TLM has the right and ability to direct and control Outpost Saloon’s activities as
16 well as a direct financial interest in the Outpost Saloon. (*Id.*).

17 Defendants Linda A. McFarlin a/k/a Linda McFarlin Miller and Timothy L. Miller
18 (“the Millers”) are the owners and managing members of Outpost Saloon. (Doc. #26 at 2-3).
19 In addition to TLM, the Millers have the right and ability to direct and control Outpost
20 Saloon’s activities as well as a direct financial interest in the Outpost Saloon. (Doc #26 at
21 3).

22 Between May 2005 and June 2009, BMI repeatedly informed both TLM and the
23 Millers (collectively known as “Defendants”) of the need to obtain permission for public
24

25 ²The twelve songs include: (1) “And When I Die;”(2) “Beat Goes On a/k/a The Beat
26 Goes On;” (3) “Folsom Prison a/k/a Folsom Prison Blues;” (4) “Stay;”(5) “Talk Dirty to
27 Me;” (6) “Kryptonite;” (7) “Unskinny Bop;” (8) “Don’t Know Why;” (9) “Metal Health a/k/a
28 Metal Health (Bang Your Head);” (10) “Whiskey Lullabye a/k/a Whiskey Lullaby;” (11)
“Lips of an Angel;” (12) “Home.” (Doc. #27-2, Exhibit A).

1 performances of copyrighted music within the BMI repertoire. (*Id.*). BMI offered to enter
2 into a blanket license agreement with Defendants, but Defendants declined to do so. (*Id.*).
3 On June 3, 2008, BMI sent a letter to Defendants to cease public performances of music
4 within the BMI repertoire. (*Id.*). BMI also sent cease and desist letters in September 2008
5 and June 2009. (*Id.*). Currently, Defendants do not have a license from BMI to publicly
6 perform any songs with the BMI repertoire at the Outpost Saloon. (*Id.*)

7 On March 6, 2009 and June 3, 2009, BMI sent investigators to chronicle songs
8 performed at Outpost Saloon. (*Id.*). BMI's investigators observed, reported, and generated
9 written reports of the twelve songs played at Outpost Saloon on those nights. (*Id.*). On June
10 18, 2009, BMI sent a letter to Defendants notifying them that BMI believed copyright
11 infringement occurred at Outpost Saloon on the respective dates. (*Id.*). Defendants did not
12 respond. (*Id.*).

13 **II. Analysis**

14 **A. Summary Disposition**

15 Plaintiffs move for Summary Disposition of their Motion for Summary Judgment.
16 (Doc. #28).

17 District Courts may establish local rules of procedure that have the force of law. Fed.
18 R. Civ. P. 83(a)(1). In the District of Arizona, Local Rule of Civil Procedure 7.2(c) requires
19 responsive memoranda to be filed within ten days after a motion is served. LRCiv. 7.2(c).
20 Local Rule 7.2(i) provides that if an “unrepresented party or counsel does not serve and file
21 the required answering memoranda . . . such non-compliance may be deemed a consent to
22 the . . . granting of the motion and the Court may dispose of the issue summarily.” LRCiv.
23 7.2(i).

24 However, under Federal Rule of Civil Procedure 56, a moving party is entitled to
25 summary judgment *only* upon a showing that there are no genuine issues of material fact
26 requiring a trial. *Henry v. Gill Indus.*, 983 F.2d 943, 950 (9th Cir. 1993) (emphasis added).
27 In fact, if the movant fails to meet its burden of demonstrating the absence of triable issues,
28 summary judgment must be denied. *Id.*

1 If a local rule requires the entry of summary judgment simply because papers
2 opposing the motion were not filed or served, and without regard to whether genuine issues
3 of material fact exist, then the local rule is inconsistent with Rule 56. *Id.* Local rules
4 inconsistent with federal rules are prohibited. Fed. R. Civ. P. 83.

5 In sum, a motion for summary judgment cannot be granted simply because there was
6 no opposition, even if the failure to oppose violated a local rule. *Henry*, 983 F.2d at 950.
7 When a district court grants summary judgment due to the opposing party not filing a timely
8 response, the district court is, in effect, imposing a sanction for the opposing party's late or
9 nonexistent filing. *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995). This type of
10 sanction is improper because the moving party must meet its burden of demonstrating an
11 absence of issues for trial rather than relying on the opposing party not filing a response. *Id.*

12 Summarily granting Plaintiffs' Motion for Summary Judgment based on Defendants'
13 lack of response does not fulfill the requirements of Rule 56. *See Marshall*, 44 F.3d at 725
14 (granting summary disposition of a summary judgment motion based on a lack of response
15 is a sanction for the opposing party's late filing); *Henry*, 983 F.2d at 950 (summary judgment
16 cannot be granted based on a lack of timely filing by the opposition). As such, the Court
17 denies Plaintiffs' Motion for Summary Disposition of Plaintiffs' Motion for Summary
18 Judgment.

19 **B. Motion for Summary Judgment**

20 Plaintiffs filed a Motion for Summary Judgment for their claim that Defendants
21 infringed upon twelve works within the BMI repertoire. (Doc. #26). Defendants did not file
22 a response.

23 Similar to the discussion above, granting a "default" summary judgment is not proper
24 unless movant's papers are sufficient to support the motion for summary judgment or on their
25 face the movant's papers reveal no genuine issue of material fact. *United States v. Real Prop.*
26 *Located at Incline Village*, 47 F.3d 1511, 1520 (9th Cir. 1995). *See also Marshall*, 44 F.3d
27 at 725 (summary judgment may not be granted simply because opposing party violated a
28 local rule; movant must still meet its burden of demonstrating absence of genuine issue for

1 trial). Accordingly, the Court evaluates Plaintiffs' Motion for Summary Judgment on the
2 merits.

3 **1. Summary Judgment Standard of Review**

4 A court must grant summary judgment if the pleadings and supporting documents,
5 viewed in the light most favorable to the non-moving party, "show that there is no genuine
6 issue as to any material fact and that the movant is entitled to judgment as a matter of law."
7 Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). At the
8 summary judgment stage, the moving party bears the initial responsibility of presenting the
9 basis for its motion and identifying those portions of the record, together with affidavits,
10 which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323.
11 However, Rule 56(c) mandates the entry of summary judgment against a party who, after
12 adequate time for discovery, fails to make a showing sufficient to establish the existence of
13 an element essential to that party's case and on which the party will bear the burden of proof
14 at trial. *Id.* at 322-23.

15 If the moving party meets its initial responsibility, the burden then shifts to the
16 opposing party who must demonstrate the existence of a factual dispute and that the fact in
17 contention is material, i.e. a fact that might affect the outcome of the suit under the governing
18 law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is
19 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non-
20 moving party. *Id.* at 250; *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th
21 Cir. 1995). Thus, Rule 56(e) compels the non-moving party to "set out specific facts
22 showing a genuine issue for trial" and not to "rely merely on allegations or denials in its own
23 pleading." Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,
24 475 U.S. 574, 586-87 (1986).

25 When considering a summary judgment motion, the court examines the pleadings,
26 depositions, answers to interrogatories, and admissions on file, together with the affidavits,
27 if any. Fed. R. Civ. P. 56(c). At summary judgment, the judge's function is not to weigh the
28 evidence and determine the truth but to determine whether there is a genuine issue for trial.

1 *Anderson*, 477 U.S. at 249. The evidence of the non-movant is “to be believed, and all
2 justifiable inferences are to be drawn in his favor.” *Id.* at 255. When a motion for summary
3 judgment is made and supported as provided in this rule, an adverse party may not rest upon
4 the mere allegations or denials of his pleadings, but his response, by affidavits or as
5 otherwise provided in this rule, must set forth specific facts showing that there is a genuine
6 issue for trial. Fed. R. Civ. P. 56(e). If he does not so respond, summary judgment, if
7 appropriate, shall be entered against him. *Id.*

8 If a party’s papers filed opposing a summary judgment motion fail to either cite to
9 materials in the court’s record or cite to materials not included in the court’s record, the court
10 is not required to scour the entire record for evidence establishing a genuine issue of fact or
11 obtain the missing materials. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028-29
12 (9th Cir. 2001); *Forsberg v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409, 1417-18 (9th Cir. 1988).
13 The Court does not have a duty to search the entire record to discover whether any evidence
14 supports the non-moving party’s positions. *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir.
15 2007).

16 **2. Copyright Infringement**

17 To prevail in their copyright infringement action, Plaintiffs must establish five
18 elements:

- 19 1. Originality and authorship of the copyrighted works involved;
- 20 2. Compliance with the formalities of the Copyright Act;
- 21 3. Proprietary rights in the copyrighted works involved;
- 22 4. Public performance of the compositions involved; and
- 23 5. Lack of authorization for public performance.

24 *Broadcast Music, Inc. v. Pine Belt Inv. Dev., Inc.*, 657 F. Supp. 1016, 1020 (S.D. Miss.
25 1987).

26 The first three elements are established in the Affidavit of Kerri Howland-Kruse,
27 BMI’s Assistant Vice President, Legal. (Doc. #27 at ¶¶ 19-20). Plaintiffs provided a
28 Schedule of Information which details the writers, publishers, dates of registration,

1 registration numbers, dates of infringement and places of infringement of each of the twelve
2 songs at issue. (Doc. #27-2 at Exhibit A). Each of the musical compositions listed on line
3 two of the Schedule was registered with the Copyright Office on the date listed on line five.
4 (Doc. #27-1 at ¶7). The Copyright Office also issued a registration certificate with the
5 number as seen on line six to the Plaintiff listed on line four or a predecessor in interest. (*Id.*)
6 (citing Doc.#27-2 at Exhibit B).

7 The fourth element, public performance, is established through the Certified
8 Infringement Reports of Nicci Boots and Susan Hereford, who were hired by BMI for the
9 purpose of visiting the Outpost Saloon and making written reports of musical compositions
10 that were performed. (Doc. #27 at ¶¶14-15). Both Boots and Hereford, BMI investigators,
11 were sent by BMI to visit the Outpost Saloon on March 6, 2009 and on June 3, 2009 to
12 chronicle the songs being publicly performed at the Outpost Saloon. (Doc. #27-9 at ¶¶13-
13 14). Boots and Hereford generated written reports of the songs played at the Outpost Saloon
14 on those nights that they had observed. (*Id.*) (citing Doc. #27-2- #27-8).

15 The fifth element, lack of authorization, is established by the fact that Defendants
16 were not licensed on the dates in question. (Doc. #27 at ¶10, 13, 17). BMI repeatedly
17 offered to enter into a license agreement with the Defendants, but Defendants chose not to.
18 (Doc. #27-9 at ¶¶ 5,11). On the specific dates in the present action, March 6, 2009, and June
19 3, 2009, Defendants were not licensed by any of the Plaintiffs to publicly perform any of the
20 musical compositions. (Doc. #27-9 at ¶¶11-12). Defendants' performances were also not
21 otherwise authorized as evidenced by the fact that BMI sent numerous cease and desist letters
22 to Defendants. (*Id.*). Defendants did not respond to any of these letters.

23 The Court finds that Plaintiffs have met their burden of proving that there exists no
24 genuine issue of any material fact. Therefore, the Court grants Plaintiffs' Motion for
25 Summary Judgment.

26 3. Statutory Damages

27 Plaintiffs request a total award of \$36,000, i.e. \$3,000 for each of the twelve acts of
28 infringement.

1 A plaintiff can receive an award of statutory damages “in a sum not less than \$750 or
2 more than \$30,000” per infringement, in lieu of an award representing the plaintiffs’ actual
3 damages and/or the defendant(s)’ profits. 17 U.S.C. § 504(c)(1). The court has the
4 discretion to assess damages within these statutory limits. *See F.W. Woolworth Co. v.*
5 *Contemporary Arts, Inc.*, 344 U.S. 228, 231-232 (1952).

6 Statutory damages are “designed to discourage wrongful conduct . . . and vindicate
7 the statutory policy.” *Id.* at 233. “The court’s award should be designed to compensate
8 plaintiffs as well as to punish defendant[s].” *Prater Music v. Williams*, 5 U.S.P.Q.2d 1813,
9 1816 (W.D. Mo. 1987).

10 To further discourage continued abuse and give effect to the Copyright Act, the
11 amount awarded in statutory damages should significantly exceed the amount of unpaid
12 license fees. *See EMI Mills Music, Inc. v. Empress Hotel, Inc.*, 470 F. Supp. 2d 67, 75-76
13 (D. Puerto Rico 2006). “If the copyright laws are to have any effect, a judgment against [a]
14 defendant must be appreciably more than the amount he would have had to expend to obtain
15 permission.” *Prater*, 5 U.S.P.Q.2d at 1816. Music users should be “put on notice that it
16 costs less to obey the copyright laws than to violate them.” *Music City Music v. Alfa Foods*
17 *Ltd.*, 616 F. Supp. 1001, 1003 (E.D. Va. 1985).

18 For example, courts have held that an award of three times the lost registration fees
19 is a ‘just’ award. *See Halnat Pub. Co. v. L.A.P.A., Inc.*, 669 F. Supp. 933 (D. Minn. 1987)
20 (awarding three times the lost registration fees of \$10,842 which amounted to \$32,526,
21 totaling over \$2,700 per infringement); *Broadcast Music, Inc. v. Entertainment Complex,*
22 *Inc.*, 198 F. Supp. 2d 1291 (N.D. Ala. 2002) (awarding plaintiffs \$43,000 in total statutory
23 damages because that approximated three times the amount of unpaid licensing fees to date;
24 award totaled \$3,909.09 for each of the eleven copyright violations); *Sailor Music v. IML*
25 *Corp.*, 867 F. Supp. 565, 570 (E.D. Mich. 1994) (noting that courts typically award three
26 times the amount of a properly purchased license for each infringement; damages range from
27 \$1,500 to \$5,000 per infringement).

28 The court may also award the amount of statutory damages to reflect the degree of

1 culpability exhibited by Defendants. *See Wow & Flutter Music v. Len's Tom Jones Tavern,*
2 *Inc.*, 606 F. Supp. 554, 555-57 (D.C.N.Y. 1985). “In a case where the copyright owner
3 sustains the burden of proving . . . that infringement was committed willfully, the court in its
4 discretion may increase the amount of statutory damages to a sum of not more than
5 \$150,000” per infringement. *Id.* “Where a defendant continues to infringe upon copyrights
6 despite repeated warnings, courts have found the defendant’s conduct to be willful.” *Prater,*
7 5 U.S.P.Q. at 1815.

8 Here, Plaintiffs’ request of \$36,000 for Defendants’ infringement furthers the statutory
9 purposes of the Copyright Act. Defendants would have paid estimated license fees between
10 2005 and 2010 in the amount of \$10,842.00. (Doc. #27 at ¶21). Thus, Plaintiffs’ requested
11 amount, \$36,000, is approximately three times the licensing fees that would have been due.
12 Additionally, this amount comports with the purposes of a statutory award within the
13 Copyright Act (i.e. to discourage abuse and give effect to the Copyright Act). *See EMI Mills*
14 *Music, Inc.* 470 F. Supp. 2d at 75-76 (the amount awarded in statutory damages should
15 significantly exceed the amount of unpaid license fees).

16 Furthermore, BMI repeatedly notified Defendants of the need to enter into a blanket
17 license agreement, but Defendants continuously failed to do so. (Doc. #26 at p. 3). Between
18 May 2005 and June 2009, BMI repeatedly informed Defendants to obtain permission or a
19 license for public performances through a series of written correspondence and 39 telephone
20 contacts. (Doc. #27-9 at ¶¶5-10). Defendants therefore willfully and deliberately violated
21 Plaintiffs’ copyrights.

22 The amount requested by Plaintiffs comports with the goals of statutory damages: to
23 discourage continued abuse and give effect to the Copyright Act. Given the willful
24 violations by Defendants, the Court finds that Plaintiffs’ requested amount of \$36,000 is
25 reasonable and appropriate.

26 **C. Attorneys’ Fees**

27 In addition to Plaintiffs’ Motion for Summary Judgment, Plaintiffs’ also seek \$479
28 in costs and \$11,980 in attorneys’ fees pursuant to 17 U.S.C. § 505 of the United States

1 Copyright Act. (Doc. #29). Plaintiffs also argue that Defendants’ lack of response entitles
2 them to summary disposition of Plaintiffs’ demand for costs and attorneys’ fees. (*Id.*).
3 Defendants did not file a response.

4 Under the Copyright Act of 1976, a court may “award a reasonable attorney’s fee to
5 the prevailing party.” 17 U.S.C. § 505. “Fees are proper under this statute when either
6 successful prosecution or successful defense of the action furthers the purposes of the
7 Copyright Act.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1120 (9th Cir. 2007).³ As
8 such, courts routinely award the reasonable fees incurred by a plaintiff. *Broadcast Music,*
9 *Inc. v. Fox Amusement Co.*, 551 F. Supp. 104, 109-10 (N.D. Ill. 1982).

10 The granting of such an award is left to the trial court’s discretion. When making such
11 a determination, the court may consider several non-exclusive factors including
12 “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal
13 components of the case) and the need in particular circumstances to advance considerations
14 of compensation and deterrence.” *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, n.19 (1994)
15 (quoting *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir.1986)).

16 When applying the above factors, a court must do so while remaining “faithful to the
17 purposes of the Copyright Act” which include not only “[securing] a fair return for an
18 ‘author’s creative labor,” but also the “[stimulation of] artistic creativity for the general
19 public good.” *Fogerty*, 510 U.S. at 526-7 (quoting *Twentieth Century Music Corp. v. Aiken*,
20 422 U.S. 151, 156 (1975)). If an award of fees would not comport with these policies, then
21 fees should not be awarded. *Fantasy*, 94 F.3d at 558.

22 The Copyright Act also expressly provides that the Court “in its discretion may allow
23 the recovery of full costs by or against any party . . .” 17 U.S.C. § 505. Under this provision,

24
25 ³According to the language of 17 U.S.C. § 505, both prevailing plaintiffs or prevailing
26 defendants are eligible for an award of fees under 17 U.S.C. § 505. *Perfect 10, Inc.*, 488 F.3d
27 at 1120. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 558 (9th Cir. 1996). The standards for
28 evaluating whether an award is proper are the same regardless of which party prevails. *Id.*

1 the courts have allowed full recovery by the prevailing party of its reasonable costs. *Milene*
2 *Music, Inc. v. Gotauco*, 551 F. Supp. 1288, 1297 (D.C.R.I. 1982).

3 Plaintiffs request attorneys' fees in the amount of \$11,980. Plaintiffs submitted ample
4 evidence to substantiate the reasonableness of the fees. For example, Plaintiffs' counsel,
5 Mark Deatherage, has handled approximately forty BMI music copyright infringement cases
6 which allows him to handle new cases efficiently. (Doc. #29 at p. 3).

7 Plaintiffs' counsel's rate of \$450 per hour in 2009 and \$475 per hour in 2010 are also
8 reasonable. These are the rates BMI has agreed to and does pay for the legal services. (*Id.*).
9 This rate is also commensurate with the rate for attorneys with similar levels of experience
10 in the Phoenix legal market for similar types of services. (*Id.*).

11 Furthermore, Plaintiffs' counsel has made many attempts to mitigate attorneys' fees
12 by sending a settlement proposal on November 12, 2009. (*Id.* at 4). However, Defendants
13 did not respond or propose a counter-offer. (*Id.*). Rather, Defendants intentionally ignored
14 their obligations under the Copyright Act and forced Plaintiffs to engage in litigation to
15 enforce their rights.

16 Plaintiffs incurred taxable costs in the amount of \$479. (Doc. #29, Exhibit 3 at p. 2)
17 These costs include the filing fee of \$350 plus \$129 for service of process. (*Id.*). The Court
18 finds that there are no factors militating against an award of the Plaintiffs' costs in the present
19 case. The award of \$479 in costs is necessary in order to effectuate private enforcement of
20 the Copyright Act.

21 The Court finds that Plaintiffs' attorneys' fees of \$11,980 and costs of \$479 are
22 reasonable and comport with the purposes of 17 U.S.C. § 505.

23 **D. Injunction**

24 Last, Plaintiffs ask the Court to permanently enjoin Defendants from infringing, in any
25 manner, the copyrighted musical compositions licensed by BMI. (Doc. #30, p. 2).

26 Any court can grant temporary and final injunctions on such terms as it may deem
27 reasonable to prevent or restrain infringement of a copyright. 17 U.S.C. § 502(a). The courts
28 have the discretionary power to grant injunctions and restraining orders, whether

1 “preliminary,” “temporary,” “interlocutory,” “permanent,” or “final,” to prevent or stop
2 infringements of copyright. H. R. Rep. No. 94-1476 (1976).

3 When granting a permanent injunction, a district court stated:

4 A permanent injunction is especially appropriate where a threat of
5 continuing infringement exists . . . The threat of continuing infringement is
6 substantial in the present case. Niro’s provided unauthorized performances
7 of copyrighted musical compositions on its premises after receiving oral
and written notices of infringement and demands to stop such infringement
from BMI. This behavior indicates a willful disregard of copyrights held by
BMI and should be permanently enjoined.

8 *Broadcast Music, Inc. v. Niro’s Palace, Inc.*, 649 F. Supp. 958, 963 (N.D. Ill. 1985).

9 As in *Niro’s*, Defendants wilfully disregarded the copyrights held by Plaintiffs.
10 Because Defendants have received numerous calls, letters, and cease and desist notices from
11 BMI but have not ceased infringement, the Court finds that a permanent injunction is
12 warranted in order to prevent future copyright violations.

13 **III. Conclusion**

14 The Court cannot summarily grant summary judgment against Defendants based on
15 Defendants’ lack of response. Nevertheless, the Court finds that Plaintiffs’ Motion for
16 Summary Judgment presents no triable material issue of fact. Therefore, Plaintiffs’ Motion
17 for Summary Judgment is granted. The Court also finds that attorneys’ fees, costs and a
18 permanent injunction are all necessary to effectuate the purposes of the Copyright Act and
19 shall thus be awarded to Plaintiffs.

20 Accordingly,

21 **IT IS ORDERED** that Plaintiffs’ Motion for Summary Disposition is denied. (Doc.
22 #28).

23 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion for Summary Judgment against
24 Defendants TLM Investments, P.L.C. d/b/a Outpost Saloon, Linda A. McFarlin a/k/a Linda
25 McFarlin Miller, and Timothy J. Miller is granted (Doc. #26), this Court finding that
26 Defendants knowingly, intentionally, and willfully infringed upon the copyrights of twelve
27 (12) musical compositions owned and/or licensed by Plaintiffs.

28 **IT IS FURTHER ORDERED** that Plaintiffs are awarded the following against TLM

1 Investments, P.L.C. d/b/a Outpost Saloon, Linda A. McFarlin a/k/a Linda McFarlin Miller,
2 and Timothy J. Miller, jointly and severally:

3 a. Statutory damages in the amount of \$3,000.00 for each of the twelve (12)
4 infringements, for a total of \$36,000.00, pursuant to 17 U.S.C. § 504(c)(1);

5 b. Taxable costs in the amount of \$479, pursuant to 17 U.S.C. § 505;

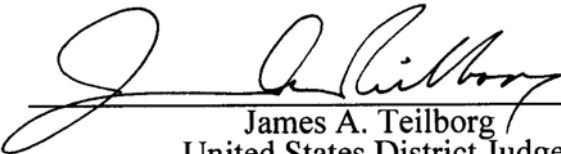
6 c. Reasonable attorneys' fees in the amount of \$11,980, plus any additional attorneys'
7 fees Plaintiffs incur in enforcing judgment; and

8 d. Interest on these amounts from entry of judgment (28 U.S.C. § 1961).

9 **IT IS FURTHER ORDERED** that Defendants TLM Investments, P.L.C. d/b/a
10 Outpost Saloon, Linda A. McFarlin a/k/a Linda McFarlin Miller, and Timothy J. Miller, and
11 their respective officers, agents, servants, employees, and attorneys, and all persons in active
12 concert or participation with any of them, are hereby permanently enjoined and restrained
13 from infringing, in any manner, the copyrighted musical compositions licensed by Broadcast
14 Music, Inc.; information pertaining to said compositions can be found at www.bmi.com.

15 **IT IS FINALLY ORDERED** that the Clerk of the Court shall enter judgment in
16 favor of Plaintiffs and against Defendants as specified above.

17 DATED this 21st day of July, 2010.

18
19
20 
21 _____
22 James A. Teilborg
23 United States District Judge
24
25
26
27
28