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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BLIZZARD ENTERTAINMENT, INC.,)	CV 09-7621 SVW (AJWx)
)	
Plaintiff,)	
)	
v.)	ORDER RE: DAMAGES
)	
ALYSON REEVES, D/B/A SCAPEGAMING,)	
and Does 1-5, inclusive,)	
)	
Defendants.)	
<hr/>)	

I. Introduction

On July 22, 2010, the Court granted Plaintiff's Motion for Default Judgment and directed Plaintiff to file additional evidence and legal briefing in order to "prove-up" its damages. Additional pertinent facts may be found in the Court's July 22 Order.

Having considered Plaintiff's supplemental evidentiary filing, the Court concludes that Plaintiff has adequately proven its damages and an evidentiary hearing is unnecessary. The hearing scheduled for August 17, 2010 is hereby VACATED.

1 **II. Legal Standards**

2 **A. Default Judgment**

3 "A party seeking a default judgment must state a claim upon which
4 it may recover." Philip Morris USA, Inc. v. Castworld Prods., Inc.,
5 219 F.R.D. 494, 498 (C.D. Cal. 2003) (citing PepsiCo Inc. v. Cal. Sec.
6 Cans, 238 F. Supp. 2d 1172 (C.D. Cal. 2002)). When reviewing a motion
7 for default judgment, the Court must accept the well-pleaded
8 allegations of the complaint relating to liability as true. TeleVideo
9 Systems Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). If the
10 plaintiff is seeking money damages, however, the plaintiff must "prove-
11 up" its damages. See SCHWARZER, TASHIMA, AND WAGSTAFFE, FEDERAL CIVIL PROCEDURE
12 BEFORE TRIAL § 6:81 (Rutter Group) (2010 supp.); Federal R. Civ. Proc.
13 55(b). The plaintiff is required to provide evidence of its damages,
14 and the damages sought must not be different in kind or amount from
15 those set forth in the complaint. Philip Morris USA, Inc., 219 F.R.D.
16 at 498. When "proving-up" damages, admissible evidence (including
17 witness testimony) supporting . . . damage calculations is usually
18 required. See FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 6:94.1 (citing Stephenson
19 v. El-Batrawi, 524 F.3d 907, 917 (8th Cir. 2008)).

20 **B. Disgorgement**

21 The Copyright Act, 17 U.S.C. § 504(b) permits the copyright owner
22 to disgorge "any profits of the infringer that are attributable to the
23 infringement." "The copyright owner is required to present proof only
24 of the infringer's gross revenue, and the infringer is required to
25 prove his or her deductible expenses and the elements of profit
26 attributable to factors other than the copyrighted work." Id.

1 **C. Statutory Damages**

2 Under the Digital Millennium Copyright Act, “[a] person committing
3 a violation of section 1201 or 1202 is liable for either (A) the actual
4 damages and any additional profits of the violator . . . or (B)
5 statutory damages as provided in paragraph (3).” 17 U.S.C. § 1203(1).
6 Regarding statutory damages, the Act states: “At any time before final
7 judgment is entered, a complaining party may elect to recover an award
8 of statutory damages for each violation of section 1201 in the sum of
9 not less than \$200 or more than \$2,500 per act of circumvention,
10 device, product, component, offer, or performance of service, as the
11 court considers just.” 17 U.S.C. § 1203(c)(3)(A).

12
13 **III. Discussion**

14 **A. Disgorgement**

15 Plaintiff seeks to disgorge \$3,052,339 in money Defendant received
16 from the users of her website.

17 Plaintiff has submitted satisfactory evidence from third party
18 PayPal Inc. showing that Defendant’s PayPal account received \$3,052,339
19 in gross revenues. (Lau Supp. Decl. Exs. A-C; see also Fed. R. Evid.
20 803(6), 1002, 1003.) Plaintiff has prepared a satisfactory summary of
21 the raw business records. (Shumway Decl. ¶ 4 & Ex. A; see also Fed. R.
22 Evid. 1006.) Finally, Plaintiff has demonstrated in its Complaint that
23 Defendant Reeves was the operative figure behind the scapegaming.com
24 website (Compl. ¶ 6); that the scapegaming.com website existed solely
25 to infringe copyrights (Compl. ¶ 127); and that the scapegaming.com
26 website received revenues through online financial transactions such as
27 the ones detailed in Plaintiff’s supplemental evidence (Compl. ¶¶ 97-
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1 103). Accordingly, Plaintiff has satisfied its burden of introducing
2 "proof . . . of the infringer's gross revenue." 17 U.S.C. § 504(b).
3 Defendant has failed to meet her rebuttal burden of "prov[ing] his or
4 her deductible expenses and the elements of profit attributable to
5 factors other than the copyrighted work." *Id.* Plaintiff is therefore
6 entitled to recover the full \$3,052,339 that Defendant received on
7 account of her infringing activities.

8 **B. Statutory Damages**

9 Plaintiff also requests \$20,886,200 in statutory damages under the
10 Digital Millennium Copyright Act. Plaintiff argues that each monetary
11 transaction reflected in PayPal's records constitutes an "act of
12 circumvention" or "performance of service" under the Act. The Court
13 previously expressed doubts regarding Plaintiff's legal theory and
14 requested further briefing.

15 Plaintiff's additional legal briefing has not altered the Court's
16 original conclusion. The Court concludes that financial transactions
17 through PayPal are not "acts of circumvention" or "performances of
18 service" that circumvent copyright-protection measures. These PayPal
19 transactions do not reflect the number of times that Plaintiff's anti-
20 piracy mechanisms have been by-passed or the number of times that
21 Defendant's servers performed their infringing services for users.
22 Rather, the quantity of transactions reflects the number of times
23 people have **paid money** to Defendant - an act that is separate from a
24 user's act of **accessing Defendant's servers**.

25 Unlike in Sony Computer Entertainment America, Inc. v. Filipiak,
26 406 F. Supp. 2d 1068, 1073-74 (N.D. Cal. 2005), and Sony Computer
27 Entertainment America, Inc. v. Divineo, Inc., 457 F. Supp. 2d 957, 966-
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1 67 (N.D. Cal. 2006), the Defendant in this case is not selling products
2 that themselves violate the Digital Millennium Copyright Act by
3 allowing users to circumvent Plaintiff's protective measures. Rather,
4 Defendant is selling products that enhance users' gaming experiences
5 while infringing Plaintiff's copyrights. Although Defendant's sales of
6 in-game items and services probably violates **some** statute, it **does not**
7 violate the statute under which Plaintiff seeks statutory damages -
8 i.e., the Digital Millennium Copyright Act.

9 That said, the Court is sympathetic to the potential difficulty
10 Plaintiff faces in calculating the number of "acts of circumvention"
11 performed on Defendant's servers. The nature of Defendant's
12 circumventing activities renders them far less susceptible to
13 calculation than the computer chip devices discussed in the Sony
14 Computer Entertainment America cases. Furthermore, the Court
15 recognizes that "[t]he ordinary rule, based on considerations of
16 fairness, does not place the burden upon a litigant of establishing
17 facts peculiarly within the knowledge of his adversary." United States
18 v. New York, N.H & H.R. Co., 355 U.S. 253, 256 n.5 (1957); see also
19 ITSI T.V. Prods., Inc. v. Agricultural Ass'ns, 3 F.3d 1289, 1292 (9th
20 Cir. 1993) ("[W]hen the true facts relating to a disputed issue lie
21 peculiarly within the knowledge of one party, the burden of proof may
22 properly be assigned to that party in the interest of fairness.")
23 (internal quotations and punctuation omitted). This rule applies
24 equally, if not more so, in the context of default judgment. See
25 Shanghai Automation Instr. Co. v. Kuei, 194 F. Supp. 2d 995, 1004 (N.D.
26 Cal. 2001); see also Henry v. Sneiders, 490 F.2d 315, 317 (9th Cir.
27 1974) (noting in default judgment action that "[a]ny insufficiency of
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1 the plaintiff's evidence was a direct result of appellant's refusal to
2 comply with a legitimate request for discovery.").

3 Accordingly, the Court is persuaded by Plaintiff's supplemental
4 evidentiary submissions showing that Defendant's website hosted 32,000
5 users on a given day in June 2008 (Shumway Decl. Ex. B); there were
6 427,393 members of Defendant's website's "community" in June 2008 (id.
7 at Ex. C.); and Defendant herself (through her alias "Peyton," see
8 Compl. ¶ 6) claimed as of March 2008 that "40,000 play on our servers
9 each day." (Shumway Decl. Ex. D.)

10 As Plaintiff demonstrates in its Complaint, Defendant's websites
11 allow Defendant's users "to bypass the anti-piracy checks [Plaintiff]
12 has implemented that otherwise take place before the game client may
13 proceed to enter the [World of Warcraft] gaming environment." (Compl.
14 ¶ 73; see also id. at ¶¶ 87-91 (describing "down-patching" process,
15 which "allows users to circumvent [Plaintiff's] authentication
16 software".) Plaintiff further demonstrates that Defendant's website
17 exists primarily to enable Defendant's users to access Plaintiff's
18 copyrighted works and circumvent Plaintiff's protective measures.
19 (Compl. ¶¶ 126-27; see generally Compl. ¶¶ 53-103 (describing
20 Defendant's operations).

21 Based on these allegations, it is reasonable to infer that
22 Defendant has provided each of its users with anti-circumvention
23 products or services on at least one occasion. Although Plaintiff is
24 unable to prove this fact definitively, the Court must draw all
25 reasonable inferences in Plaintiff's favor on account of Defendant's
26 failure to participate in the litigation process. See, e.g., Henry v.
27 Sneiders, 490 F.2d at 317 ("Any insufficiency of the plaintiff's
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1 evidence was a direct result of appellant's refusal to comply with a
2 legitimate request for discovery."). Accordingly, the Court concludes
3 that each of the 427,393 community members downloaded, accessed, or
4 otherwise used anti-circumvention software, services, or products.
5 Defendant's website's primary purpose was to enable users to circumvent
6 Plaintiff's technological protection measures, and Defendant has failed
7 to introduce any evidence showing that any of Defendant's users were
8 engaged in benign activities. Accordingly, the Court concludes that
9 the appropriate amount of statutory damages is \$85,478,600 (that is,
10 427,393 users multiplied by the statutory minimum of \$200 per "act of
11 circumvention" and/or "performance of service"). To the extent that
12 this figure appears unreasonably large, Congress has mandated this
13 approach and the Court is unable to deviate from it.

14 **3. Attorney's Fees**

15 Plaintiff has sought \$63,600 in attorneys' fees. Pursuant to 17
16 U.S.C. § 505, the Court may award reasonable attorneys' fees to the
17 prevailing party. See also Local Rule 55-3 (prevailing party in
18 default judgment may recover attorneys' fees if allowed by contract or
19 statute). The Court has previously concluded that the allegations and
20 evidence reveal that Defendant's acts of infringement were willful.

21 Plaintiff is therefore entitled to recover the full amount of the
22 fees it has requested, \$63,600. The Court concludes that although this
23 amount is far smaller than allowable under Local Rule 55-3, this is a
24 reasonable amount under 17 U.S.C. § 505.

25 26 **IV. Conclusion**

27 The hearing scheduled for August 17, 2010 is hereby VACATED.
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1 Based on Plaintiff's evidentiary submissions, the Court concludes that
2 Plaintiff is entitled to default judgment in the amount of \$3,052,339
3 in disgorged profits, \$85,478,600 in statutory damages, and \$63,600 in
4 attorneys' fees. The Court will file a separate judgment accordingly.
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8 IT IS SO ORDERED.
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11 DATED: August 10, 2010



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STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE