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**United States District Court  
Central District of California**

MICROSOFT CORPORATION, a  
Washington corporation  
  
Plaintiff,  
  
v.  
  
OSCAR RIVERA and DOES 1-10,  
  
Defendants.

Case No. 2:17-cv-07027-ODW(JPRx)

**ORDER GRANTING PLAINTIFF’S  
MOTION FOR DEFAULT  
JUDGMENT [45]**

**I. INTRODUCTION**

Presently before the Court is Plaintiff Microsoft Corporation’s Motion for Default Judgment. (“Mot.,” ECF No. 45.) For the following reasons, the Court **GRANTS** Microsoft’s Motion for Default Judgment and issues a permanent injunction restraining Rivera’s infringement of Microsoft’s trademarks and copyrights.<sup>1</sup>

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<sup>1</sup> After carefully considering the papers filed in connection with the Motion, the Court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

1 **II. BACKGROUND**

2 **A. Factual Background**

3 Microsoft is in the business of developing, advertising, marketing, distributing,  
4 and licensing computer software programs. (Compl. ¶13, ECF No. 1.) Rivera, among  
5 others, is alleged to have sold counterfeit Microsoft software and product activation  
6 keys decoupled from the software they were authorized to activate. (*Id.* ¶ 27.)

7 Between November 10, 2016, and March 17, 2017, a Microsoft Corporation  
8 investigator conducted three test purchases of Microsoft software subscriptions from  
9 online marketplaces. (*Id.* ¶¶ 38, 46, 51.) The seller, “orz152,” was identified as  
10 Rivera. (*Id.* ¶ 38.) The Microsoft investigator paid Rivera through PayPal. (*Id.* ¶¶ 38,  
11 46, 51.) Rivera provided the Microsoft investigator with instructions for accessing  
12 and installing the Microsoft software along with usernames, passwords, and product  
13 keys. (*Id.* ¶¶ 39, 47.)

14 After each test purchase, the Microsoft investigator received parcels in the mail  
15 bearing the return address of Rivera or one of his alleged co-conspirators. (*Id.* ¶¶ 40,  
16 47, 54.) The parcels enclosed DVDs containing usernames and passwords for  
17 subscription accounts and counterfeit Microsoft products. (*Id.* ¶¶ 40, 49, 54.)  
18 Microsoft holds valid copyrights and trademarks on the products Rivera is alleged to  
19 have illicitly distributed to the Microsoft investigator and Microsoft did not authorize  
20 Rivera to distribute these products. (*Id.* ¶¶ 45, 50, 55, 60–62.)

21 As a result, Microsoft seeks injunctive relief against Rivera to prevent him from  
22 conducting his alleged fraud scheme. (Mot. 20–22.)

23 **B. Procedural Background**

24 Microsoft filed its Complaint on September 22, 2017. (Compl., ECF No. 1.)  
25 Rivera was served personally pursuant to Fed. R. Civ. P. 4(e) on October 12, 2017.  
26 (Proof of Service, ECF No. 19.) After Rivera’s failure to answer the Complaint,  
27 Microsoft filed a Request to Enter Default against Rivera on January 23, 2018. (ECF  
28 No. 30.) The Clerk entered default against Rivera on January 23, 2018. (ECF No.

1 34.)

### 2 III. LEGAL STANDARD

3 Pursuant to Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 55(b), a Court  
4 may grant default judgment after the Clerk enters default under Rule 55(a). *See*  
5 *PepsiCo Inc., v. Cal. Security Cans*, 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002). A  
6 district court has discretion whether to enter default judgment. *Aldabe v. Aldabe*, 616  
7 F.2d 1089, 1092 (9th Cir. 1980). In exercising its discretion, a court must consider  
8 several factors, including: the possibility of prejudice to plaintiff; the merits of  
9 plaintiff’s substantive claim; the sufficiency of the complaint; the sum of money at  
10 stake; the possibility of a dispute concerning material facts; whether the defendant’s  
11 default was due to excusable neglect; and the strong policy underlying the Federal  
12 Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d  
13 1470, 1471–72 (9th Cir. 1986).

14 Upon default, the defendant’s liability generally is conclusively established, and  
15 the well-pleaded factual allegations in the complaint are accepted as true. *Televideo*  
16 *Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–19 (9th Cir. 1987) (per curiam) (citing  
17 *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977)). If the allegations  
18 sufficiently establish liability, the court must then determine the “amount and  
19 character” of the relief that should be awarded. *Elektra Entm’t Grp. Inc. v. Crawford*,  
20 226 F.R.D. 388, 394 (C.D. Cal. 2005).

### 21 IV. DISCUSSION

22 As a threshold matter, the Court must determine whether it has jurisdiction over  
23 this proceeding before addressing if Microsoft has met the procedural requirements  
24 for default judgment. The Court must then examine whether the *Eitel* factors weigh in  
25 favor of granting default judgement before addressing the relief entitled to Microsoft,  
26 if any.

#### 27 A. Jurisdiction

28 Before addressing Microsoft’s request for entry of default judgment, the Court

1 must determine whether it has jurisdiction over the parties and the subject matter. *In*  
2 *re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). The Court may exercise subject matter  
3 jurisdiction over the parties under 28 U.S.C. §§ 1331 and 1338 because Microsoft  
4 alleges Rivera violated the Lanham Act and Copyright Act. (Compl. ¶ 8.) Since  
5 Rivera was personally served in California, and is presently domiciled here, the Court  
6 has personal jurisdiction over the parties. (Compl. ¶ 9.) *Burnham v. Sup. Ct.*, 495 U.S.  
7 619 (1990); *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) Consequently, the  
8 Court’s jurisdiction is proper.

9 **B. Procedural Requirements**

10 Before a court can enter default judgment, the requesting party must satisfy the  
11 procedural requirements set forth in Rule 55 of the Federal Rules of Civil Procedure,  
12 as well as the Local Rules of this district. *PepsiCo*, 238 F. Supp. 2d at 1174. Central  
13 District of California Local Rule 55–1 requires the movant to submit a declaration  
14 establishing: (1) when and against whom the default was entered; (2) identification of  
15 the pleading to which default was entered; (3) whether the defaulting party is a minor,  
16 an incompetent person, or exempt under the Servicemembers’ Civil Relief Act; and  
17 (4) that the defaulting party was served with notice, if required by Fed. R. Civ. P.  
18 55(b)(2). *Vogel v. Rite Aid Corp.*, 992 F. Supp. 2d 998, 1006 (C.D. Cal. 2014); C.D.  
19 Cal. Local Rule 55-1.

20 In accordance with Fed. R. Civ. P. 55 and Local Rule 55-1, by declaration,  
21 Microsoft’s attorney identified the Complaint and established that the Clerk of the  
22 Court entered default against Rivera on January 23, 2018. (Decl. of James Harlan  
23 Corning ¶ 6, ECF No. 42.) The Declaration further confirmed that Rivera is neither a  
24 minor nor an incompetent person, nor is Rivera exempt under the Servicemember’s  
25 Civil Relief Act. (*Id.* ¶ 7–8.) Finally, Microsoft provided the court with notice that  
26 Rivera has not appeared in this action, and, as such, notice of default judgement is  
27 unnecessary under Rule 55(b)(2), as referenced by Local Rule 55-1(e). (*Id.* ¶ 9.)  
28 Accordingly, the Court finds that Microsoft complied with all the procedural

1 requirements.

### 2 **C. Microsoft’s Motion for Default Judgment**

3 The Court finds that the *Eitel* factors favor default judgment. The Court will  
4 discuss each factor in turn.

#### 5 **1. First *Eitel* Factor: Microsoft Would Suffer Prejudice if Default is** 6 **Not Entered**

7 The first *Eitel* factor considers whether Microsoft will suffer prejudice if default  
8 judgment is not entered. *PepsiCo*, 238 F. Supp. 2d at 1177. When a defendant fails to  
9 appear and defend their claims, the plaintiff would be without recourse and suffer  
10 prejudice unless default judgment is entered. *Id.*

11 Here, Rivera failed to appear to contest this allegation. Without a default  
12 judgment, Microsoft would be left without recourse and suffer prejudice for the  
13 damages incurred as a result of Rivera’s conduct. Accordingly, the first *Eitel* factor  
14 weighs in favor of granting default judgment.

#### 15 **2. Second and Third *Eitel* Factor: Microsoft’s Claims are** 16 **Meritorious and Sufficiently Pleaded**

17 The second and third *Eitel* factors address the merits and sufficiency of  
18 plaintiff’s claims pleaded in the complaint. *Eitel*, 782 F.2d at 1471–72.

##### 19 **i. Copyright Infringement**

20 Computer programs are “tangible mediums of expression” entitled to copyright  
21 protection. *Wall Data Inc. v. Los Angeles Cty. Sheriff’s Dep’t*, 447 F.3d 769, 776 (9th  
22 Cir. 2006) (quoting *Apple Computer, Inc. v. Formula Int’l Inc.*, 725 F.2d 521, 524–25  
23 (9th Cir. 1984)). To prove copyright infringement, Microsoft must establish “(1)  
24 ownership of a valid copyright, and (2) copying of constituent elements of the work  
25 that are original.” *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846  
26 (9th Cir. 2012) (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361  
27 (1991)).

28

1 Here, Microsoft presented a Certificate of Registration from the United States  
2 Copyright Office demonstrating ownership of a valid copyright in Office 2016.  
3 (Compl., Ex. 2.) Such a demonstration of ownership constitutes prima facie evidence  
4 of the validity of the copyright. *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345  
5 F.3d 1140, 1144 (9th Cir. 2003). Since Rivera has not appeared to rebut this showing,  
6 the Court concludes that Microsoft owns a valid copyright in Office 2016. Further, it  
7 is undisputed that Rivera copied Office 2016 to DVDs, which were then  
8 impermissibly sold and delivered to the Microsoft investigator. (*Id.* ¶¶ 38–41, 46–55.)  
9 Accordingly, Microsoft has sufficiently pleaded a meritorious copyright infringement  
10 claim.

## 11 ii. Contributory Copyright Infringement

12 To prevail on a claim of contributory copyright infringement, a plaintiff must  
13 establish: (1) direct infringement; (2) that defendant had knowledge of the direct  
14 infringement; and (3) that defendant intentionally induced, encouraged or materially  
15 contributed to the direct infringement. *See MGM Studios Inc. v. Grokster, Ltd.*, 545  
16 U.S. 913, 930 (2005); *see also A&M Records, Inc.*, 239 F.3d at 1019.

17 Here, it is undisputed that Rivera’s customers have unwittingly infringed  
18 Microsoft’s copyrights by downloading and installing protected Microsoft software  
19 without authorization or right under law. (Compl. ¶ 72; Mot. 16.) Further, Microsoft  
20 has pleaded facts sufficient to support the conclusion that Rivera had knowledge of his  
21 customers’ direct infringement. (*Id.* ¶¶ 38–41, 46–55.) Specifically, upon each test  
22 purchase, Rivera directed the Microsoft investigator to download the file or provided  
23 the Microsoft investigator with a link to download the file. (Compl. ¶¶ 38, 47, 52.)  
24 Finally, it is undisputed that Rivera materially contributed to his customers’ direct  
25 infringement. (*Id.* ¶ 72.) Specifically, Rivera advertised, sold, and distributed  
26 decoupled product keys for Office 2016, which the Microsoft investigator used to  
27 download and install Microsoft’s copyrighted software. (*Id.* ¶¶ 27, 38–41, 46–55.)  
28 But for Rivera’s conduct, that infringement would not have occurred. Accordingly,

1 Microsoft has sufficiently pleaded a meritorious claim for contributory copyright  
2 infringement.

### 3 **iii. Trademark Infringement**

4 “To be liable for trademark infringement under the Lanham Act, a person must  
5 (1) use in commerce (2) any word, false designation of origin, false or misleading  
6 description, or representation of fact, which (3) is likely to cause confusion or  
7 misrepresents the characteristics of his or another person’s goods or services.”  
8 *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 902 (9th Cir. 2007); 15 U.S.C. §  
9 1125(a)(1).

10 Here, Rivera impermissibly advertised and sold counterfeit Microsoft products  
11 on a “popular online marketplace.” (Compl. ¶¶ 38, 46, 51.) Further, Rivera  
12 impermissibly used Microsoft trademarks to advertise and promote the sale of  
13 counterfeit Microsoft products. (*Id.* ¶ 80; Mot. 17.) Finally, such a misleading use of  
14 Microsoft trademarks would likely confuse customers into believing that they are  
15 purchasing legitimate Microsoft products, which they are not. (Compl. ¶ 80; Mot.  
16 17.) Accordingly, Microsoft has sufficiently pleaded a meritorious claim for  
17 trademark infringement.

### 18 **iv. False Designation of Origin**

19 The Lanham Act creates civil liability for

20 [a]ny person who, on or in connection with any goods or  
21 services . . . uses in commerce any word . . . which . . . is  
22 likely to cause confusion, or to cause mistake, or to deceive  
23 as to the affiliation, connection, or association of such  
24 person with another person, or as to the origin, sponsorship,  
or approval of his or her goods, services, or commercial  
activities by another person.

25 15 U.S.C. § 1125(a)(1).

26 To prevail on its claim of false designation of origin, a plaintiff “must show that  
27 1) [the defendant] made false or deceptive advertisements and representations to  
28 customers; 2) those advertisements and representations actually deceived a significant

1 portion of the consuming public; and 3) [the plaintiff] was injured by [the defendant's]  
2 conduct.” *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 257 (9th Cir. 1995).

3 Here, it is undisputed that Rivera advertised the counterfeit products as  
4 authentic, licensed Microsoft software by using Microsoft’s name, marks, and visual  
5 design. (Compl. ¶¶ 38, 46, 51, 87–88.) Further, actual confusion is presumed if the  
6 plaintiff can prove the defendant intentionally deceived the consumers. *Telecredit*  
7 *Serv. Corp. v. Elec. Transaction Corp.*, 974 F.2d 1343 (9th Cir. 1992). It is  
8 undisputed that Rivera intentionally engaged in his fraud scheme to deceive the  
9 consuming public as to the authenticity of the Microsoft software. (Compl. ¶ 88.)  
10 Consequently, Rivera has failed to rebut this presumption of actual confusion, so the  
11 second element is satisfied. Finally, Microsoft has suffered injury “by way of diverted  
12 sales and the dilution of its goodwill with its customers” because of Rivera’s false  
13 advertising. (Mot. 18.) Accordingly, the Court finds that Microsoft has sufficiently  
14 pleaded a meritorious claim for false designation of origin.

15 Accordingly, the second and third *Eitel* factors weigh in favor of granting  
16 default judgment.

### 17 **3. Fourth *Eitel* Factor: The Sum of Money at Stake Weighs in Favor** 18 **of Default Judgment**

19 The fourth *Eitel* factor balances “the amount of money at stake in relation to the  
20 seriousness of the [d]efendant’s conduct.” *Pepsico*, 238 F. Supp. 2d at 1176. Stated  
21 otherwise, the Court is required to assess whether the recovery sought is proportional  
22 to the harm caused by the Rivera’s conduct. *Landstar Ranger, Inc. v. Parth*  
23 *Enterprises, Inc.*, 725 F. Supp. 2d 916, 921 (C.D. Cal. 2010).

24 Here, Microsoft seeks narrowly tailored injunctive relief without monetary  
25 damages. (Mot. 18.) Such relief is proportional to the harm caused because Plaintiff  
26 only seeks to prevent Rivera from continuing his illicit distribution of Microsoft’s  
27 products. (*Id.*) Accordingly, the fourth *Eitel* factor favors entry of default judgement.



1                   **4. Fifth *Eitel* Factor: There is no Possibility of Disputed Fact**

2           The fifth *Eitel* factor examines whether material facts are disputed. *Eitel*, 782  
3 F.2d at 1471–72. “Upon entry of default, all well-pleaded facts in the complaint are  
4 taken as true, except those relating to damages.” *Television Sys., Inc. v. Heidenthal*,  
5 826 F.2d 915, 917-18 (9th Cir. 1987).

6           Here, because Rivera defaulted, Microsoft’s facts supporting its claims are  
7 undisputed. Accordingly, the fifth *Eitel* factor favors entry of default judgment.

8                   **5. Sixth *Eitel* Factor: The Defendant’s Default is Not Due to**  
9                   **Excusable Neglect**

10          The sixth *Eitel* factor considers whether Rivera’s default was due to excusable  
11 neglect. *Eitel*, 782 F.2d at 1471-72.

12          Here, Rivera was properly served according to Fed. R. Civ. P. 4(e) on October  
13 12, 2017, and the Proof of Service was filed with the Court. (ECF No. 18.) Thus, the  
14 possibility of excusable neglect is remote. Accordingly, the sixth *Eitel* factor favors  
15 entry of default judgment.

16                   **6. Seventh *Eitel* Factor: Policy for Deciding on the Merits Does Not**  
17                   **Preclude Default Judgment**

18          Finally, the seventh *Eitel* factor reflects the policy that “cases should be decided  
19 upon their merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. However,  
20 “a decision on the merits [is] impractical, if not impossible” when a defendant fails to  
21 answer the plaintiff’s complaint. *PepsiCo Inc.*, 238 F. Supp. 2d at 1177.

22          Here, a decision on the merits is not possible since Rivera did not respond to the  
23 complaint. Accordingly, the seventh *Eitel* factor favors entry of default judgment.

24          Since the *Eitel* factors weigh in favor of granting default judgment, Microsoft is  
25 entitled to default judgment against Rivera.

26                   **C. Relief Sought**

27          Having determined that Microsoft’s Motion for Default Judgment should be  
28 granted, the Court now turns to Microsoft’s measure of relief. Microsoft requests that

1 the Court impose a permanent injunction against Rivera to prevent future illicit  
2 distribution of Microsoft products. (Mot. 19.) Injunctive relief is authorized to  
3 prevent copyright infringement and trademark violations under 17 U.S.C. § 502(a) and  
4 15 U.S.C. § 1116(a), respectively. “As a general rule, a permanent injunction will be  
5 granted when liability has been established and there is a threat of continuing  
6 violations.” *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511, 520 (9th Cir.1993). To  
7 justify injunctive relief, a plaintiff must demonstrate that: 1) it has suffered an  
8 irreparable injury; 2) remedies available at law, such as monetary damages, are  
9 inadequate to compensate for that injury; 3) the equities tip in the plaintiff’s favor; and  
10 4) the injunction serves the public interest. *eBay Inc. v. MercExchange, L.L.C.*, 547  
11 U.S. 388, 391 (2006). For the following reasons, Microsoft has satisfied each of the  
12 required elements.

### 13 **1. Irreparable Harm**

14 Rivera copied, sold, and distributed copyrighted Microsoft software and  
15 decoupled product activation keys, which defrauded Microsoft and its customers,  
16 infringed on Microsoft’s intellectual property rights, and harmed Microsoft’s brand  
17 and goodwill. As owner of the copyrighted software, Microsoft has the right to  
18 choose how, when, and where it is reproduced and distributed. *Metro-Goldwyn-*  
19 *Mayer Studios Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1218 (C.D. Cal. 2007).  
20 Rivera violated that right. Absent an injunction, Rivera’s conduct may continue  
21 indefinitely, leading to irreparable harm.

### 22 **2. Inadequate Remedy at Law**

23 Given the profitable nature of Rivera’s fraudulent scheme, such conduct will  
24 likely continue to harm to Microsoft’s brand and goodwill. Only an injunction will  
25 adequately prevent future violations of Microsoft’s copyright. *See Apple, Inc. v.*  
26 *Pystar Corp.*, 673 F. Supp. 2d 943, 949–50 (N.D. Cal. 2009). Accordingly, monetary  
27 damages are inadequate.

1                                   **3. Balance of Equities & Public Interest**

2           Rivera has no legitimate interest in continuing to violate Microsoft’s copyright.  
3 *See Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir. 1997)  
4 (quoting *Triad Sys. Corp. v. Southeastern Exp. Co.*, 64 F.3d 1330, 1338 (9th Cir.  
5 1995), *superseded by statute on other grounds as recognized in Apple Inc. v. Psystar*  
6 *Corp.*, 658 F.3d 1150, 1158 (9th Cir. 2011)) (“Where the only hardship that the  
7 defendant will suffer is lost profits from an activity which has been shown likely to be  
8 infringing, such an argument in defense merits little equitable consideration...”).  
9 Further, as previously mentioned, absent an injunction Rivera is free to continue to  
10 defraud the consuming public and Microsoft may continue to lose profits and  
11 goodwill. For these reasons, the equities tip in Microsoft’s favor and the public  
12 interest is served by entering an injunction. Accordingly, the Court **GRANTS**  
13 Microsoft’s request for an injunction and enjoins Rivera from further violating  
14 Microsoft’s copyright.

15                                                           **V. CONCLUSION**

16           For the foregoing reasons, the Court **GRANTS** Microsoft’s Motion for Default  
17 Judgment. (ECF No. 45.) The Court shall issue judgment.  
18

19 **IT IS SO ORDERED.**

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21  
22                   April 16, 2019



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23                                                           **OTIS D. WRIGHT, II**  
24                                                           **UNITED STATES DISTRICT JUDGE**