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8 **United States District Court**  
9 **Central District of California**  
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11 ANDREW PROKOS, an individual,  
12 Plaintiff,

13 v.

14 COVERED WAGON INVESTMENTS  
15 INC., a California Corporation,  
16 Defendant.

Case No. 2:19-cv-08493-ODW (GJSx)

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR DEFAULT  
JUDGMENT [17]**

17  
18 **I. INTRODUCTION**

19 Plaintiff Andrew Prokos (“Prokos”) moves for entry of default judgment against  
20 Defendant Covered Wagon Investments, Inc. (“Covered Wagon”). (Mot. for Default J.  
21 (“Mot.”) 1, ECF No. 17.) For the reasons discussed below, the Court **GRANTS**  
22 Prokos’s Motion (“Motion”).<sup>1</sup>

23 **II. FACTUAL BACKGROUND**

24 Prokos initiated this action against Covered Wagon for copyright infringement.  
25 Prokos alleges that Covered Wagon used images of a photograph (“Photograph”) in  
26 violation of the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (Compl. ¶¶ 1, 9, 13,  
27

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

1 ECF No. 1.) Specifically, Prokos alleges that Covered Wagon used, distributed, and  
2 exploited images of the Photograph, entitled HARLEM-0446-1000PX, for commercial  
3 purposes, including in multiple posts on its website. (Compl. ¶¶ 8–9, 13.) According  
4 to his Complaint, Prokos registered the Photograph with the United States Copyright  
5 Office on April 15, 2013, with the Registration Number of VAu 1-133-407. (Compl.  
6 ¶ 8.) Prokos is the sole owner of the Photograph. (Compl. ¶ 8.)

7 On October 4, 2019, Prokos served a Summons and Complaint on Covered  
8 Wagon. (See Proof of Service, ECF No. 9.) Covered Wagon failed to respond to the  
9 Summons and Complaint, and, on October 30, 2019, Prokos requested entry of default.  
10 (See Req. for Entry of Default, ECF No. 12.) The Clerk of the Court entered default  
11 the next day. (See Default by Clerk, ECF No. 15.) Prokos now moves for entry of  
12 default judgment and seeks statutory damages, costs, and attorneys’ fees. (Mot. 1.)

### 13 III. LEGAL STANDARD

14 Federal Rule of Civil Procedure (“FRCP”) 55(b) authorizes a district court to  
15 grant default judgment after the Clerk enters default under FRCP 55(a). Fed. R. Civ.  
16 P. 55(b)(2). Before a court can enter default judgment against a defendant, the plaintiff  
17 must satisfy the procedural requirements set forth in Local Rule 55-1. Local Rule 55-1  
18 requires that the movant submit a declaration establishing: (1) when and against which  
19 party default was entered; (2) identification of the pleading to which default was  
20 entered; (3) whether the defaulting party is a minor or incompetent person; (4) that the  
21 Servicemembers Civil Relief Act, 50 U.S.C. § 3931, does not apply; and (5) that the  
22 defaulting party was properly served with notice, if required under Rule 55(b)(2). C.D.  
23 Cal. L.R. 55-1.

24 If these procedural requirements are satisfied, a district court has discretion to  
25 enter a default judgment. See *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).  
26 However, “a defendant’s default does not automatically entitle the plaintiff to a  
27 court-ordered judgment.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1174  
28 (C.D. Cal. 2002). In exercising its discretion, a court considers several factors (“*Eitel*

1 Factors”): (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff’s  
2 substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake;  
3 (5) the possibility of a dispute concerning material facts; (6) whether the defendant’s  
4 default was due to excusable neglect; and (7) the strong policy favoring decision on the  
5 merits. *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). Generally, upon  
6 entry of default by the Clerk, the defendant’s liability is conclusively established, and  
7 the well-pleaded factual allegations in the complaint are accepted as true, except those  
8 pertaining to the amount of damages. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915,  
9 917–19 (9th Cir. 1987) (per curiam) (citing *Geddes v. United Fin. Grp.*, 559 F.2d 557,  
10 560 (9th Cir. 1977)).

#### 11 IV. DISCUSSION

12 The Court first considers whether Prokos satisfies the procedural requirements,  
13 then whether the *Eitel* Factors weigh in favor of an entry of default judgment, and finally  
14 what damages, if any, are appropriate.

##### 15 A. Procedural Requirements

16 Prokos has submitted a declaration stating: (1) the Clerk entered default against  
17 Covered Wagon on October 31, 2019; (2) default was entered based on the Complaint  
18 Prokos filed on October 1, 2019; (3) Covered Wagon is neither an infant nor an  
19 incompetent; (4) Covered Wagon is not covered under the Servicemembers Civil Relief  
20 Act, 50 U.S.C. § 3931, and (5) although not required under FRCP 55(b)(2) because  
21 Covered Wagon has not appeared in any capacity, Prokos mailed a copy of this Motion  
22 to Covered Wagon through the United States Postal Service. (*See* Decl. of Stephen M.  
23 Doniger (“Doniger Decl.”) ¶¶ 1–2, 4–5, 8, ECF No. 17.) Thus, Prokos satisfies the  
24 procedural requirements of Local Rule 55-1.

##### 25 B. *Eitel* Factors

26 Once the procedural requirements have been met, district courts consider the *Eitel*  
27 Factors in exercising discretion for granting default judgment. *Eitel*, 782 F.2d at  
28

1 1471–72. For the reasons discussed below, the Court finds that the *Eitel* Factors weigh  
2 in favor of granting default judgment.

3 *1. Possibility of Prejudice to the Plaintiff*

4 The first *Eitel* Factor considers whether the plaintiff will suffer prejudice if  
5 default judgment is not entered. *Eitel*, 782 F.2d at 1471. Denial of default judgment  
6 leads to prejudice when it leaves a plaintiff without a remedy or recourse to recover  
7 compensation. *See Landstar Ranger, Inc. v. Parth Enter., Inc.*, 725 F. Supp. 2d 916,  
8 920 (C.D. Cal. 2010); *PepsiCo*, 238 F. Supp. 2d at 1177. Covered Wagon elected not  
9 to participate in this action after being properly notified. (*See* Proof of Service.) Absent  
10 a default judgment, Prokos has no recourse to recover against Covered Wagon for its  
11 alleged violations of the Copyright Act. Therefore, this factor weighs in favor of default  
12 judgment.

13 *2. Substantive Merits & 3. Sufficiency of the Complaint*

14 The second and third *Eitel* Factors together “require that a plaintiff state a claim  
15 on which the [plaintiff] may recover.” *Philip Morris USA, Inc. v. Castworld Prods.,*  
16 *Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003) (alteration in original) (citing *PepsiCo*, 238  
17 F. Supp. 2d at 1175.) Although well-pleaded allegations in the complaint are admitted  
18 by the defendant’s failure to respond, “necessary facts not contained in the pleadings,  
19 and claims which are legally insufficient, are not established by default.” *Cripps v. Life*  
20 *Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

21 Prokos alleges facts sufficient to establish that Covered Wagon violated the  
22 Copyright Act. The Copyright Act confers certain exclusive rights to valid owners of  
23 copyrighted works, including the exclusive right to “reproduce the copyrighted work in  
24 copies.” 17 U.S.C. § 106(1). To establish a claim for copyright infringement, Prokos  
25 must prove: “(1) ownership of a valid copyright, and (2) copying of constituent elements  
26 of the work that are original.” *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1110  
27 (9th Cir. 2019) (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361  
28 (1991)).

1 First, Prokos alleges that he is the sole owner of the exclusive rights to the  
2 Photograph. (Compl. ¶ 8.) Prokos additionally alleges that the Photograph was  
3 registered with the United States Copyright Office on April 15, 2013, with the  
4 Registration Number VAu 1-133-407. (Compl. ¶ 8.) Thus, taking these allegations as  
5 true, Prokos has sufficiently alleged that he is the exclusive owner of the rights of a  
6 valid copyright.

7 Second, Prokos can establish copying of constituent elements by showing:  
8 (1) Covered Wagon had access to Prokos’s Photograph, and (2) that the Photograph and  
9 the image that appear on Covered Wagon’s website are “substantially similar.” *Folkens*  
10 *v. Wyland Worldwide, LLC*, 882 F.3d 768, 774 (9th Cir. 2018). Prokos alleges that  
11 Covered Wagon had access to the Photograph through Prokos’s website and social  
12 media accounts, or through viewing it on third-party websites such as Tumblr and  
13 Pinterest. (Compl. ¶ 12.) In addition, the Complaint contains an image of the  
14 Photograph compared to a screen capture of the image on Covered Wagon’s website.  
15 (Compl. ¶ 10.) The images appear not only substantially similar but identical. Thus,  
16 taking these allegations as true, Prokos has sufficiently alleged that Covered Wagon  
17 copied the constituent elements of the Photograph.

18 In sum, Prokos has sufficiently alleged both that he is the owner of a valid  
19 copyright, the Photograph, and that Covered Wagon copied the constituent elements of  
20 the Photograph. Therefore, Prokos has alleged a valid copyright infringement claim on  
21 which he may recover. The second and third *Eitel* Factors weigh in favor of default  
22 judgment.

#### 23 4. *The Sum of Money at Stake*

24 The fourth *Eitel* Factor balances “the amount of money at stake in relation to the  
25 seriousness of [the] [d]efendant’s conduct.” *PepsiCo*, 238 F. Supp. 2d at 1176; *Eitel*,  
26 782 F.2d at 1471. The amount at stake must be proportionate to the harm alleged.  
27 *Landstar*, 725 F. Supp. 2d at 921. “Default judgment is disfavored where the sum of  
28 money at stake is too large or unreasonable in light of the defendant’s actions.” *Truong*

1 *Gian Corp. v. Twinstar Tea Corp.*, No. C 06-03594 JSW 2007 WL 1545173, at \* 12  
2 (N.D. Cal. May 29, 2007). In his Complaint, Prokos seeks “statutory damages as  
3 available under the Copyright Act, 17 U.S.C. § 101 *et seq.*” (Compl. at 5.) In his  
4 Motion, Prokos seeks \$30,000 in statutory damages, the maximum amount permitted  
5 for non-willful infringement under 17 U.S.C. § 504(c)(1). (Mot. 1.) As this amount  
6 falls within the range permitted for the alleged harm under 17 U.S.C § 504(c)(1), the  
7 amount at stake appears to be within the range permissible, and thus is proportionate to  
8 the harm alleged. Thus, this factor weighs in favor of granting default judgment.

9 *5. Possibility of Dispute*

10 The fifth *Eitel* Factor considers the possibility of dispute regarding material facts.  
11 *PepsiCo*, 238 F. Supp. 2d at 1177. As Covered Wagon has failed to respond to the  
12 Complaint or this Motion, no factual dispute exists because the allegations in the  
13 Complaint are presumed true. *See Vogel v. Rite Aid Corp.*, 992 F. Supp. 2d 998, 1013  
14 (C.D. Cal. 2014). Thus, this factor weighs in favor of default judgment.

15 *6. Possibility of Excusable Neglect*

16 The sixth *Eitel* Factor considers whether Covered Wagon’s default is the result  
17 of excusable neglect. *Eitel*, 782 F.2d at 1470. No facts before the Court indicate that  
18 Covered Wagon’s default is due to excusable neglect. On October 4, 2019, Prokos  
19 served Covered Wagon with a Summons and Complaint. (*See* Proof of Service.)  
20 Additionally, on December 2, 2019, Prokos mailed Covered Wagon notice of this  
21 Motion. (*See* Certificate of Service, ECF No. 18.) Covered Wagon failed to respond  
22 to both. From these facts, the Court finds that Covered Wagon’s default is not due to  
23 excusable neglect. Thus, this factor weighs in favor of default judgment.

24 *7. Policy Favoring Decision on the Merits*

25 “[D]efault judgments are ordinarily disfavored. Cases should be decided on their  
26 merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. However, where a  
27 defendant fails to answer a complaint, “a decision on the merits [is] impractical, if not  
28 impossible.” *PepsiCo*, 238 F. Supp. 2d at 1177. As discussed, Covered Wagon elected

1 not to respond both to the Summons and Complaint and this Motion, rendering a  
2 decision on the merits impossible. (*See* Default by Clerk.) Thus, this factor weighs in  
3 favor of default judgment.

4 In sum, the *Eitel* Factors weigh in favor of default judgment. Therefore, the Court  
5 **GRANTS** Prokos’s request for entry of default judgment.

6 **C. Statutory Damages**

7 After finding entry of default judgment appropriate, courts must next determine  
8 the terms of the judgment. The Copyright Act provides that a copyright owner may  
9 elect to recover statutory damages in lieu of actual damages any time before a final  
10 judgment is entered. 17 U.S.C. § 504(c)(1). The Act allows for damages of not less  
11 than \$750 nor more than \$30,000 with respect to any one work. *Id.* Moreover, where  
12 the court finds that the infringement was committed willfully, it has discretion to  
13 heighten the award to a sum no greater than \$150,000. 17 U.S.C. § 504(c)(2). Courts  
14 have “wide discretion in determining the amount of statutory damages to be awarded,  
15 constrained only by the specified maxima and minima.” *Harris v. Emus Records Corp.*,  
16 734 F.2d 1329, 1335 (9th Cir. 1984).

17 On default judgment, “statutory damages are appropriate . . . because the  
18 information needed to prove actual damages is within the infringers’ control and is not  
19 disclosed.” *Microsoft Corp. v. Nop*, 549 F. Supp. 2d 1233, 1238 (E.D. Cal. 2008);  
20 *Barcroft Media, Ltd. v. Soc. Trends Media, Inc.*, No. CV 17-5277-R, 2018 WL 4745305,  
21 at \*2 (C.D. Cal. May 1, 2018). In determining statutory damages, courts often use  
22 estimates of actual damages or licensing fees. *See Michaels v. Nohr*, No. CV 15-06353-  
23 AB (JEMx), 2015 WL 12532177, at \*9 (C.D. Cal. Dec. 17, 2015); *Nat’l Photo Grp.,*  
24 *LLC v. Pier Corp.*, No SACV 13-1165-DOC (JPRx), 2014 WL 12576641, at \*4 (C.D.  
25 Cal. Mar. 10, 2014) (noting that courts typically award “two to three times the license  
26 fees” in cases involving copyright infringements of photographs). Courts are guided by  
27 “what is just in the particular case,” specifically considering “the nature of the copyright  
28 [and] the circumstances of the infringement.” *Peer Int’l Corp. v. Pausa Records, Inc.*,

1 909 F.2d 1332,1336 (9th Cir. 1990) (quoting *F.W. Woolworth Co. v. Contemporary*  
2 *Arts, Inc.*, 344 U.S. 228, 232 (1952)).

3 Prokos seeks \$30,000 in statutory damages for Covered Wagon’s alleged willful  
4 act of infringement.<sup>2</sup> (Mot. 7.) Prokos argues that \$30,000—the statutory maximum  
5 for *non-willful* infringements—is reasonable because it is “smaller” than the heightened  
6 statutory maximum of \$150,000 for a single act of *willful* infringement. (Mot. 9.) He  
7 asserts that anything less than the statutory maximum for non-willful infringement  
8 would “effectively reward” Covered Wagon for refusing to take responsibility for its  
9 unlawful conduct and encourage others to follow suit. (Mot. 10.)

10 As alleged, Prokos makes it clear that Covered Wagon used the Photograph in  
11 violation of the Copyright Act. He asserts that Covered Wagon had access to the  
12 Photograph through “website and social media accounts” or third-party websites such  
13 as Tumblr and Pinterest. (Mot. 4.) Although he states an incorrect website in his  
14 Complaint, Prokos presents evidence of Covered Wagon’s use of the Photograph by  
15 providing a screen capture of the Photograph on Covered Wagon’s now inoperable  
16 website, [www.coveredwagoninvestments.com](http://www.coveredwagoninvestments.com). (Compl. ¶¶ 9–10; Decl. of Andrew  
17 Prokos Exs. 1–2, ECF Nos. 17-2–17-3.) However, with respect to damages, Prokos  
18 presents no evidence as to the amount of actual damages or licensing fee for the  
19 Photograph. Moreover, Prokos presents no evidence as to how Covered Wagon’s use  
20 of the Photograph facilitated its commercial purposes. For instance, Prokos does not  
21 allege how Covered Wagon featured the Photograph on its website, how long Covered  
22 Wagon used the Photograph, or how Covered Wagon’s use of the Photograph drew  
23 website viewership or sales. Thus, the circumstances of this infringement simply do  
24 not warrant an award of \$30,000.

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26 <sup>2</sup> In his Complaint, Prokos requests actual damages in an amount to be determined, “or, if elected  
27 before final judgment, statutory damages as available under 17 U.S.C. § 101 *et seq.*” (Compl. at 5.)  
28 Although Prokos does not seek a specific amount of damages in his Complaint, he is nonetheless  
eligible for statutory relief because he raises it in his Complaint. *See Henry v. Sneiders*, 490 F.2d 315,  
317 (9th Cir. 1974); *Hearst Holdings, Inc. v. Kim*, No. CV 07-4642 GAF (JWJx), 2008 WL 11336137,  
at \*4, 6 (C.D. Cal. Aug. 17, 2008).



1 This case is similar to other copyright claims adjudicated in the Central District  
2 where courts awarded much lower statutory damages. For instance, in *Durant v. REP*  
3 *Publishing, Inc.*, the court awarded \$750 each for two photographs posted on the  
4 defendant’s website where one photograph was used in support of an article and the  
5 other was used for “unclear” purposes. No. CV 17-08077-AB (SSx), 2018 WL  
6 6137156, at \*4 (C.D. Cal. Aug. 13, 2018); *see also Barcroft Media, Ltd.*, 2018 WL  
7 4745305, at \*3 (awarding \$750 each for two photographs, neither of which with  
8 licensing fees, posted on the defendants’ website in violation of the Copyright Act).  
9 Accordingly, considering nature of the copyright and the circumstances of the  
10 infringement, the Court concludes that an award of \$750 sufficiently compensates  
11 Prokos while effectively deterring those who might engage in similar unlawful conduct.

12 **D. Costs and Attorneys’ Fees**

13 Prokos requests litigation costs of \$487.95 and attorneys’ fees of \$2,400.00.  
14 (Doniger Decl. ¶¶ 6–7.) A party who has violated the Copyright Act may be liable for  
15 attorneys’ fees and costs under 17 U.S.C. § 505. On default judgment, the Court  
16 determines attorneys’ fees pursuant to the Schedule of Attorneys’ Fees provided in  
17 Local Rule 55-3. The Schedule provides that an amount of Judgment between \$0.01  
18 and \$1000 warrants an award of attorneys’ fees of thirty percent with a minimum of  
19 \$250. C.D. Cal. L.R. 55-3. As thirty percent of \$750 is less than \$250, the Court awards  
20 the minimum of \$250 in attorneys’ fees. Additionally, the Court accepts Prokos’s  
21 representation regarding litigation costs and awards costs in the amount of \$487.95.  
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**CONCLUSION**

For the reasons discussed above, the Court **GRANTS** Prokos’s Motion for Default Judgment and **awards \$750 in statutory damages**. The Court further **awards \$250 in attorneys’ fees and \$487.95 in costs**. The Court will issue Judgment.

**IT IS SO ORDERED.**

March 23, 2020



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