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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DANIEL M. MILLER, Plaintiff, vs. FACEBOOK, INC. and YAO WEI YEO, Defendants.	**CASE NO.: CV-10-264 (WHA)** **PLAINTIFF DANIEL M. MILLER'S MOTION FOR DEFAULT JUDGMENT** Date: May 19, 2011 Time: 8:00 A.M. Court: Courtroom 9, 19th Floor Judge: Honorable William Alsup

NOTICE OF MOTION FOR DEFAULT JUDGMENT

TO THE COURT AND DEFENDANT YAO WEI YEO:

PLEASE TAKE NOTICE THAT at 8:00 A.M. on May 19, 2011, or as soon thereafter as counsel may be heard, in Courtroom 9 on the 19th Floor of this Court, located at 450 Golden Gate Avenue, San Francisco, California, before the Honorable William Alsup, Plaintiff Daniel M. Miller ("Plaintiff") will and hereby does move this Court, pursuant to Rule 55 of the Federal Rules of Civil Procedure, for an entry of default judgment against Defendant Yao Wei Yeo ("Yeo") d/b/a Zwigglers Apps ("Zwigglers") for damages for copyright infringement in the sum total of One Hundred Forty-Seven Thousand One Hundred and Three Dollars and Two Cents ($147,103.02) and post-judgment interest calculated pursuant to 28 U.S.C. § 1961(a). Plaintiff also seeks entry of a permanent injunction pursuant to 17 U.S.C. § 502 prohibiting Yeo d/b/a Zwigglers from further infringement of the Plaintiff's copyright on his video game program entitled *Boomshine*. Lastly, pursuant to 17 U.S.C. § 505, the Plaintiff seeks costs from Yeo in the amount of $1,492.50.

MOTION FOR DEFAULT JUDGMENT

I. SUMMARY OF RELEVANT FACTS

The Plaintiff authored and published the video game *Boomshine* in March, 2007, and was thereafter duly and lawfully granted a copyright registration on *Boomshine,* Registration No. TX0007089855. Exh. 1 (Second Amended Complaint, ¶¶ 9, 11-12). Defendant Yeo does business as Zwigglers Apps on the websites www.facebook.com/zwigglers and www.zwigglers.com. Exh. 1 (Second Amended Complaint, ¶ 13). At least as early as April, 2009, Yeo published a game entitled *ChainRxn* on a Facebook webpage called the *ChainRxn* canvas page. Exh. 1 (Second Amended Complaint, ¶¶ 14, 17). *ChainRxn* copies the look and feel

of *Boomshine* by incorporating almost every visual element of the game. Exh. 1 (Second Amended Complaint, ¶¶ 25, 36). Without authorization from the Plaintiff, Yeo unlawfully copied *Boomshine* and infringed the Plaintiff's copyright by reproducing and distributing *ChainRxn* on the Facebook *ChainRxn* canvas page. Exh. 1 (Second Amended Complaint, ¶¶ 14, 17, 20). On October 9, 2009, the Plaintiff filed the instant action against Yeo and Defendant Facebook, Inc., ("Facebook") for copyright infringement. Declaration of Brian D. Hancock ("Hancock Decl."), ¶ 3. On June 3, 2010, the Plaintiff filed his Second Amended Complaint against Yeo and Facebook. Hancock Decl., ¶ 5. On June 3, 2010, the Plaintiff served a subpoena duces tecum on Media Temple, Inc., a website hosting and software application services company in Culver City, California, seeking all information in its possession pertaining to Yeo. Hancock Decl., ¶ 6. Media Temple responded by providing information showing that Yeo is the listed account owner for the "ZWIGGLERS.COM" domain name. *Id.* The address listed by Media Temple for Yeo is 353 Third Avenue, Suite 246, New York, NY 10010. *Id.* Pursuant to Rule 4(e)(1) of the Federal Rules of Civil Procedure, §§ 415.40 and 417.20 of the California Code of Civil Procedure, and applicable case law, Yeo was duly served with a copy of the Summons and Second Amended Complaint on July 8, 2010, as set forth in the Plaintiff's Proof of Service filed on that same date. Hancock Decl., ¶ 7; Exh. 2 (Proof of Service).

Yeo has failed to answer or otherwise appear in this action. Hancock Decl., ¶ 8. As a result, the Clerk of the Court entered Yeo's default on September 22, 2010. Hancock Decl., ¶ 8; *see also* Exh. 3 (Entry of Default). Upon information and belief, Yeo is not an infant or incompetent person nor in active military service. Hancock Decl., ¶ 9. Presently, the Facebook *ChainRxn* canvas page is not accessible to Facebook users, however, the *ChainRxn* application continues to be available on the webpage http://chainrxn.zwigglers.com. Hancock Decl., ¶ 4.

Spruce Media, Inc., (formerly doing business as SocialCash, Inc.), and RockYou, Inc., are entities that made payments to Yeo d/b/a Zwigglers totaling $147,103.02 related to advertising hosted on the Facebook *ChainRxn* canvas page from April, 2009, to February, 2010, and June, 2010, respectively. Declaration of Bradley Green ("Green Decl."), ¶¶ 5-6; Declaration of Robert Kajikami ("Kajikami Decl."), ¶ 5-6. Since Yeo has refused to enter an appearance in this action, and the Plaintiff has had no opportunity to propound discovery on Yeo concerning the total amount of revenue he's received that is directly attributable to the *ChainRxn* application, the Plaintiff unfortunately has no way of knowing if the $147,103.01 paid by Spruce Media, Inc. (formerly doing business as SocialCash, Inc.) and RockYou, Inc. constitutes all monies received by Yeo attributable to his infringing activity.

By this Motion, the Plaintiff respectfully requests that the Court enter default judgment against Yeo for: (1) $147,103.02, which is the amount proven to have been received by Yeo resulting directly from his unlawful reproduction and distribution of the infringing *ChainRxn* program, plus post-judgment interest calculated pursuant to 28 U.S.C. § 1961(a); (2) a permanent injunction prohibiting further infringement by Yeo of the Plaintiff's copyright; (3) costs from Yeo in the amount of $1,492.50 pursuant to 17 U.S.C. § 505.

II. ARGUMENT

A. Legal Standard

For purposes of a default judgment, the well-pled allegations of the complaint are taken as true. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 918 (9th Cir. 1987). If the court determines that a defendant is in default, the defendant's liability is collectively established and the factual allegations in the complaint, except those relating to damages, are accepted as true. *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). The power to grant or deny relief upon an

application for default judgment is within the discretion of the court. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).

B. Default Judgment Against Yeo is Warranted and Appropriate.

When determining whether to grant default judgment, courts are instructed to consider the following factors: (1) the substantive merit of the plaintiff's claim; (2) the sufficiency of the complaint; (3) the amount of money at stake; (4) the possibility of prejudice to the plaintiff if relief is denied; (5) the possibility of disputes to any material facts in the case; (6) whether default resulted from excusable neglect; and (7) the public policy favoring resolution of cases on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986); *accord PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002); *Discovery Communications, Inc. v. Animal Planet, Inc.*, 172 F. Supp. 2d 1282, 1287 (C.D. Cal. 2001). "In applying this discretionary standard, default judgments are more often granted than denied." *PepsiCo, Inc. v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999). As set forth below, each of the factors weighs in favor of granting default judgment, and, thus, Plaintiff's Motion should be granted.

1. The Plaintiff has Stated a Sufficient Claim for Relief.

The first two *Eitel* factors, which consider the substantive merit of the Plaintiff's claims and the sufficiency of the complaint, essentially require that the allegations in the Plaintiff's complaint state sufficient claims for relief. *Cal. Sec. Cans,* 238 F. Supp. 2d at 1175; *Discovery Communications, Inc.*, 172 F. Supp. 2d at 1288.

To prevail on his claim for copyright infringement under the Copyright Act, the Plaintiff must prove that Yeo violated an exclusive right of the copyright owner as provided by § 106 of the Copyright Act, which provides, in pertinent part:

> [T]he owner of copyright under this title has the exclusive right to do and to authorize any of the following: (1) to reproduce the

> copyrighted work in copies or phonorecords;…(3)to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

17 U.S.C. § 106. In other words, § 106 provides the copyright owner with the exclusive right to copy or distribute the copyrighted work to the public.

Furthermore, § 501 of the Copyright Act provides, in pertinent part, that "anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 [of the Copyright Act]…is an infringer of the copyright or right of the author, as the case may be," and that the "legal or beneficial owner of an exclusive right under a copyright is entitled…to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. § 501(a)-(b).

Here, the Plaintiff's Second Amended Complaint alleges that the Plaintiff is the owner of the federally registered copyright on *Boomshine* and that, at least as early as April, 2009, Yeo has infringed the Plaintiff's copyright by unlawfully reproducing and distributing the infringing video game program *ChainRxn*. Exh. 1 (Second Amended Complaint, ¶¶ 12-14, 25, 36). Furthermore, the Court has, on two prior occasions, ruled that the allegations of copyright infringement against Yeo in the Plaintiff's Second Amended Complaint are sufficiently well-pled under applicable law. (Dkt. Nos. 56 and 69). Thus, the Plaintiff has sufficiently pled the elements necessary to state a copyright infringement claim against Yeo.

2. The Monetary Judgment Requested by the Plaintiff is Reasonable.

The third *Eitel* factor, the amount of money at stake, also weighs in Plaintiff's favor seeing as the monetary judgment requested is fully supported by applicable law. Section 504(b) of the Copyright Act provides the following:

> [T]he copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any

> profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue….

17 U.S.C. § 504(b). "When a copyright is infringed…each defendant is severally liable for his or its own illegal profit; one defendant is not liable for the profit made by another." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 519 (9th Cir. 1985).

Section 504 of the Copyright Act also provides for the recovery of statutory damages, but only where the complained-of infringement first commenced after the effective date of copyright registration. *See* 17 U.S.C. § 412; *see also Oddo v. Ries*, 743 F.2d 630, 634-35 (9th Cir. 1984). The effective date of the Plaintiff's copyright registration is May 5, 2009, and Yeo's infringement of the Plaintiff's copyright first commenced as early as April 2009. Hancock Decl., ¶ 10; Exh. 1 (Second Amended Complaint, ¶ 14).

Thus, the only damages recoverable by the Plaintiff to compensate him for Yeo's infringement, for which the Plaintiff has proof in light of Yeo's failure to answer or otherwise appear in this action, is the $147,103.02 that was generated by the advertising displayed on the Facebook *ChainRxn* canvas page and paid to Yeo d/b/a Zwigglers by RockYou, Inc., and Spruce Media, Inc. (formerly doing business as SocialCash, Inc.). This is gross revenue obtained by Yeo, within the meaning of § 504(b) of the Copyright Act, that is directly and solely attributable to the infringing video game, *ChainRxn*. It is not unreasonable to award the Plaintiff the requested amount where no other compensation for this infringement can be proven by the Plaintiff due to Yeo's failure to answer or otherwise appear in this action and the Plaintiff's concomitant inability to propound discovery on Yeo in this regard.

Lastly, the Plaintiff is reasonable in seeking recovery of the costs incurred by Plaintiff in filing this lawsuit and for service of process on Yeo. *Jackson v. Sturkie*, 255 F. Supp. 2d 1096,

1103 (N.D. Cal. 2003) (awarding costs, among other things, to the plaintiff pursuant to its motion for default judgment). Section 505 of the Copyright Act allows the Court, in its discretion, to award the Plaintiff recovery of full costs. 17 U.S.C. ¶ 505. The costs incurred by the Plaintiff in filing this action and perfecting service of process on Yeo totals $1,492.50. Hancock Decl., ¶ 11.

3. The Plaintiff Will Be Prejudiced if Relief is Denied.

Another factor that the Court may consider when deciding whether to grant default judgment is whether there is a significant possibility of prejudice to the Plaintiff if default judgment is not entered. This factor also weighs in Plaintiff's favor because if default judgment is not entered, the Plaintiff would be denied the right to judicial resolution of his claim against Yeo, and would be without other recourse for recovery. *See Cal. Sec. Cans*, 238 F. Supp. 2d at 1177. Indeed, if default judgment is denied, Yeo's conduct will remain unchecked, and he will be free to pursue similar activities in the future. Thus, this factor also favors the entry of default judgment.

4. There is No Possibility of Any Disputes Concerning Material Facts.

The fifth *Eitel* factor considers the possibility of dispute as to any material facts in this case. As set forth above, the Plaintiff filed a well-pleaded Second Amended Complaint alleging the elements necessary to prevail on a cause of action for copyright infringement against Yeo. Upon entry of default, all factual allegations set forth in the Second Amended Complaint, except those relating to damages, are deemed true. *Televideo Sys., Inc.*, 826 F.2d at 917-18. Because the clerk of the court entered default judgment against Yeo on September 22, 2010, and the allegations of the Second Amended Complaint are therefore taken as true, no genuine dispute as to any material fact exists. *See Cal. Sec. Cans*, 238 F. Supp. 2d at 1177.

5. Default Did Not Result From Excusable Neglect.

Under the sixth *Eitel* factor, the Court considers the possibility that Yeo's default resulted from excusable neglect. Due process requires that interested parties be given notice of the pendency of the action and be afforded an opportunity to present its objections before a final judgment is rendered. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Yeo was served with the Summons and Second Amended Complaint. Hancock Decl., ¶ 7; Exh. 2 (Proof of Service). Yeo has had ample time to try to resolve this matter but has, instead, elected not to appear or take any action whatsoever. Yeo's voluntary decision to allow default to be entered contradicts any argument for excusable neglect.

The facts of this case are dissimilar from those in *Eitel*, in which the defendant's failure to answer constituted excusable neglect because the defendant believed the litigation was over due to a final settlement agreement that subsequently dissolved. The defendant in *Eitel*, soon thereafter, filed an answer and counterclaim, even though it was beyond the 20-day period. *Eitel*, 782 F.2d at 1472. The Defendant in the present case has failed to act despite all opportunity to do so with full knowledge that a lawsuit was filed against him and that it was his responsibility to respond.

6. Public Policy Warrants the Entry of a Default Judgment.

Although public policy favors the resolution of a case on its merits, "this preference, standing alone, is not dispositive." *See PepsiCo., Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d at 1177. Yeo's failure to answer the Plaintiff's Second Amended Complaint makes a decision on the merits impractical, if not impossible. Under Rule 55(a) of the Federal Rules of Civil Procedure, termination of a case before hearing the merits is allowed whenever a defendant fails to defend an action. Fed. R. Civ. P. 55(a). Thus, "the preference to decide cases on the merits does not preclude a court from granting default judgment." *Cal. Sec. Cans*, 238 F. Supp. 2d at 1177.

Because Yeo failed to respond to, or defend, this action in any way, this factor should not preclude the Court from entering a default judgment against him.

For all of the foregoing reasons, each of the *Eitel* factors favors the entry of default judgment against Yeo. The Plaintiff, therefore, respectfully requests that the Court grant default judgment against Yeo, and grant the requested monetary damages and permanent injunction set forth below.

III. THE PLAINTIFF IS ENTITLED TO A PERMANENT INJUNCTION.

The Plaintiff has alleged in his Second Amended Complaint, and has presented specific evidence, that Yeo has infringed his copyright in the video game *Boomshine* by reproducing and distributing the video game program *ChainRxn*, which copies the look and feel of *Boomshine*, on the Facebook *ChainRxn* canvas page, which is presently disabled, as well as the website http://chainrxn.zwigglers.com. Exh. 1 (Second Amended Complaint, ¶ 13, 14, 17, 25, 36); Hancock Decl., ¶ 4. Further, Yeo's failure to respond or otherwise appear in this action does not encourage that Yeo has stopped infringing the Plaintiff's copyright. *Jackson*, 255 F. Supp. 2d at 1103 (granting permanent injunction as part of default judgment in part because "defendant's lack of participation in this litigation has given the court no assurance that defendant's infringing activity will cease"). Unless enjoined, Yeo's infringement will continue with irreparable harm and damage to the Plaintiff. Therefore, the Plaintiff, as prayed for in the Second Amended Complaint, requests that this Court enter permanent injunctive relief enjoining and restraining Yeo, and all agents, licensees, servants, successors, and assigns of Yeo, and any and all persons, firms, corporations, or other entities in active concert or participation with Yeo, from the manufacture, publication, reproduction, display, distribution, advertising of, sale, or offer for sale of the video

game program entitled *ChainRxn* and any other work which infringes the Plaintiff's registered copyright in *Boomshine*.

WHEREFORE PREMISES CONSIDERED, the Plaintiff respectfully requests the relief set forth in this Motion and all other relief deemed just and necessary by the Court.

Dated: April 12, 2011

Respectfully submitted,

s/ Brian D. Hancock

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ATTORNEYS FOR PLAINTIFF

PROOF OF SERVICE

I hereby certify that I have served a true and correct copy of the above and foregoing upon the following by certified United States Mail and electronic mail this 12th day of April, 2011:

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s/ Brian D. Hancock
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