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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 THE THOMPSONS FILM, LLC,

8 Plaintiff,

9 v.

10 ROSS KAPPEN, et al.,

11 Defendants.

NO: 13-CV-0126-TOR

ORDER DENYING PLAINTIFF'S  
MOTION FOR DEFAULT  
JUDGMENT AS AGAINST HAYES,  
KAPPEN, MAXWELL, AND URENA

12 BEFORE THE COURT is Plaintiff's Motion for Default Judgments and  
13 Permanent Injunctions against Defendants Hayes, Kappen, Maxwell, and Urena  
14 (ECF No. 108). This matter was submitted for consideration without oral  
15 argument. The Court has reviewed the motion and the record and files herein and  
16 is fully informed.

17 FACTS<sup>1</sup>

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19 <sup>1</sup> Unless otherwise noted, these facts are excerpted from Plaintiff's complaint and  
20 used for purposes of the instant motion only.

1 This is an action concerning alleged copyright infringement of a motion  
2 picture. Plaintiff The Thompsons Film, LLC, is a limited liability company that  
3 produced the motion picture at issue in this matter, *The Thompsons*. Defendants are  
4 identified as having at least one of the following roles: 1) BitTorrent users or peers  
5 whose computers are collectively interconnected and used for illegally copying and  
6 distributing Plaintiff's motion picture; 2) contributing to the infringement of  
7 Plaintiff's copyright by others; 3) permitting, facilitating, and/or promoting the use  
8 of the internet access identified by the IP address for the infringing of Plaintiff's  
9 exclusive rights under the Copyright Act by others.

10 BitTorrent is an interactive peer-to-peer file transfer technology protocol.  
11 Peer-to-peer networks, in their most common form, are computer systems enabling  
12 users to make files stored on each user's computer available for copying by other  
13 users, to search for files stored on other users' computers, and to transfer exact  
14 copies of the files from one computer to another via the internet. The complaint  
15 alleges that Plaintiff has recorded each Defendant identified (through his or her IP  
16 address) as actually copying and publishing Plaintiff's motion picture via  
17 BitTorrent, as Plaintiff's investigator has downloaded the motion picture from each  
18 Defendant. Plaintiff alleges that, upon information and belief, each Defendant was  
19 a willing and knowing participant in the file transfer "swarm" at issue and engaged  
20 in such participation for the purpose of infringing Plaintiff's copyright.

1 Plaintiff sued Defendants, claiming copyright infringement, contributory  
2 infringement, and indirect infringement of copyright. Plaintiff's First Amended  
3 Complaint requests damages of \$30,000 from each Defendant pursuant to 17  
4 U.S.C. § 504(c)(1) for its claims of infringement and contributory infringement,  
5 and damages of not more than the statutory minimum of \$750.00 on its indirect  
6 infringement claim. Plaintiff also requests entry of permanent injunctions  
7 enjoining each Defendant from directly, contributorily or indirectly infringing  
8 Plaintiff's rights in Plaintiff's motion picture, and reasonable costs and attorney  
9 fees.

10 The Clerk of Court has entered orders of default for all Defendants named in  
11 the instant motion. Despite being properly served, as of the date of this Order, the  
12 Non-Appearing Defendants have not filed an answer or moved to set aside their  
13 default. Plaintiff now moves for default judgment seeking the relief requested in its  
14 First Amended Complaint.

#### 15 DISCUSSION

16 Motions for entry of default judgment are governed by Federal Rule of Civil  
17 Procedure 55(b). Rule 55(b)(1) provides that the Clerk of Court may enter default  
18 judgment when the plaintiff's claim "is for a sum certain or a sum that can be made  
19 certain by computation." Fed. R. Civ. P. 55(b)(1). When the value of the claim  
20 cannot be readily determined, or when the claim is for non-monetary relief, the

1 plaintiff must move the court for entry of default judgment. Fed. R. Civ. P.  
2 55(b)(2). In such circumstances, the court has broad discretion to marshal any  
3 evidence necessary in order to calculate an appropriate award. See Fed. R. Civ. P.  
4 55(b)(2)(A)-(D). At the default judgment stage, well-pleaded factual allegations  
5 are considered admitted and are sufficient to establish a defendant's liability, but  
6 allegations regarding the amount of damages must be proven. *Geddes v. United*  
7 *Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977); *Microsoft Corp. v. Lopez*, 2009 WL  
8 959219 (W.D.Wash. 2009). The court must ensure that the amount of damages is  
9 reasonable and demonstrated by the evidence. See Fed. R. Civ. P. 55(b); *Getty*  
10 *Images (US), Inc. v. Virtual Clinics*, 2014 WL 358412 (W.D.Wash. 2014).

11 The entry of default judgment under Rule 55(b) is “an extreme measure.”  
12 *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1170 (9th Cir. 2002). “As a general  
13 rule, default judgments are disfavored; cases should be decided upon their merits  
14 whenever reasonably possible.” *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d  
15 1183, 1189 (9th Cir. 2009). In determining whether to enter default judgment, a  
16 court should consider the following factors: “(1) the possibility of prejudice to the  
17 plaintiff; (2) the merits of the plaintiff’s substantive claim; (3) the sufficiency of  
18 the complaint; (4) the sum of money at stake in the action; (5) the possibility of a  
19 dispute concerning material facts; (6) whether the default was due to excusable  
20 neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure

1 favoring decisions on the merits.” *Eitel v. McCool*, 782 F.2d 1470, 1471-72; *see*  
2 *also United States v. VanDenburgh*, 249 F. App’x 664, 665 (2007).

3 The Court considers each of the factors in turn.

4 1. Possibility of Prejudice to Plaintiff

5 Despite having been properly served, the Non-Appearing Defendants have  
6 failed to plead or otherwise defend. As a result, Plaintiff’s claims against them  
7 cannot move forward on the merits, and Plaintiff’s ability to obtain effective relief  
8 has been prejudiced. This factor weighs in favor of entering default judgment.

9 2. Merits of Plaintiff’s Substantive Claims

10 Plaintiff’s complaint alleges copyright infringement, contributory  
11 infringement, and indirect infringement of copyright for Defendants’ alleged  
12 participation in a BitTorrent “swarm.” Despite receiving notice of Plaintiff’s  
13 allegations of infringement, the non-appearing Defendants have failed to plead or  
14 otherwise defend. This factor weighs in favor default judgment.

15 3. Sufficiency of the Complaint

16 The Court finds that the first amended complaint states a claim upon which  
17 relief may be granted in that it is grounded in a cognizable legal theory and alleges  
18 sufficient facts to support that theory. This factor weighs in favor of entering  
19 default judgment.

1       4. Sum of Money at Stake

2           Plaintiff has requested the highest amount of statutory damages available  
3 under the Copyright Act, \$30,000. In a copyright infringement case, a plaintiff  
4 may elect either actual or statutory damages. 17 U.S.C. § 504(a). Statutory  
5 damages may be not less than \$750 or more than \$30,000, “as the court considers  
6 just.” 17 U.S.C. § 504(c)(1). “In a case where the copyright owner sustains the  
7 burden of proving, and the court finds, that infringement was committed willfully,  
8 the court in its discretion may increase the award of statutory damages to a sum of  
9 not more than \$150,000. In a case where the infringer sustains the burden of  
10 proving, and the court finds, that such infringer was not aware and had no reason to  
11 believe that his or her acts constituted an infringement of copyright, the court in its  
12 discretion may reduce the award of statutory damages to a sum of not less than  
13 \$200.” 17 U.S.C. § 504(c)(2).

14           Plaintiff argues that statutory damages may be increased if a defendant  
15 willfully infringed the copyright, and that Plaintiff alleged in its complaint that  
16 defendants willfully infringed the copyright, and facts in the complaint are  
17 admitted as true. ECF No. 108 at 3-4. Plaintiff, while maintaining that it is entitled  
18 to increased statutory damages because Defendants’ conduct was willful, seeks  
19 “only” \$30,000 in statutory damages. *Id.* at 6.

1           Insofar as Plaintiff’s argument about increased statutory damages for willful  
2 infringement is made to justify its request of \$30,000 damages for each infringer,  
3 the Court is unpersuaded. Plaintiff has alleged, *inter alia*, that “numerous  
4 Defendants, either directly or indirectly, engaged in mass copyright infringement  
5 of Plaintiff’s motion picture,” ECF No. 28 at 19; “Each Defendant knew or should  
6 have known the infringing conduct observed by Plaintiff was unlicensed and in  
7 violation of Plaintiff’s copyrights,” *id.* at 18; “each Defendant whose conduct  
8 constitute direct infringement was a willing and knowing participant in the swarm  
9 at issue and engaged in such participation for the purpose of infringing Plaintiff’s  
10 copyright,” *id.* at 19; “Defendants’ conduct has been willful, intentional, in  
11 disregard of and indifferent to Plaintiff’s rights,” *id.* at 21. In other words,  
12 examined as a whole, Plaintiff has only very generally alleged willfulness—  
13 without any specific findings as to which defendants might have willfully infringed  
14 or what behavior indicates their willfulness. Well pleaded allegations in a  
15 complaint are deemed admitted on a motion for default judgment, *see Matter of*  
16 *Visioneering Constr.*, 661 F.2d at 124, but the allegations must in fact be well  
17 pleaded—Plaintiff’s allegations on this point are not. Plaintiff’s complaint only  
18 alleges the most bare bones indication of willfulness, unsupported with factual  
19 allegations indicating intent or knowledge of infringement. Furthermore, the first  
20 amended complaint alleges only that at least some of the Defendants acted

1 willfully. Thus, Plaintiff acknowledges that some of the Defendants may have been  
2 involved only unintentionally with the swarm. The Court will not impute a state of  
3 mind to all Defendants based on such a pleading. Thus, Plaintiff's argument about  
4 willfulness, without more, is insufficient to sustain a finding that the Court should  
5 impose a \$30,000 fine on each Defendant named in the instant motion.

6 5. Possibility of Dispute as to Material Facts

7 Given that the Non-Appearing Defendants have not answered the Complaint  
8 or otherwise participated in this case, there remains a possibility that material facts  
9 are disputed. This factor weighs against entering default judgment.

10 6. Whether Default is Attributable to Excusable Neglect

11 The Court has no means of determining whether excusable neglect  
12 contributed to the default of the Non-Appearing Defendants. Given that each of  
13 these Defendants was properly served, however, the Court will presume that  
14 excusable neglect did not play a role. This factor weighs in favor of entering  
15 default judgment.

16 7. Policy Favoring Decisions on the Merits

17 Public policy clearly favors resolution of cases on their merits. *Eitel*, 782  
18 F.2d at 1472; *Westchester Fire*, 585 F.3d at 1189. Nevertheless, this policy must  
19 eventually yield to the proper administration of justice. Where, as here, a party



1 fails to defend on the merits of a claim, entry of default judgment is generally an  
2 appropriate remedy.

3         However, in this case, where Plaintiff has requested sizable statutory  
4 damages, the Court elects to exercise its power under Rule 55(b)(2) to “conduct  
5 hearings” to “determine the amount of damages” and “establish the truth of any  
6 allegation by evidence.” Fed. R. Civ. P. 55(b)(2). Accordingly, the Court directs  
7 Plaintiffs to brief and provide evidence supporting the amount of damages against  
8 each defaulting defendant separately. Upon a showing substantiating Plaintiff’s  
9 damages against each Defendant, the Court will reconsider Plaintiff’s motion for  
10 default judgment and request for attorney fees.

11 **ACCORDINGLY, IT IS HEREBY ORDERED:**

12         Plaintiff’s Motion for Default Judgments and Permanent Injunctions Against  
13 Defendants Hayes, Kappen, Maxwell, and Urena (ECF No. 108) is **DENIED with**  
14 **leave to renew.** Plaintiff is directed to submit a memorandum and evidence in  
15 support of its claims against each defaulting Defendant and in support of its request  
16 for damages on or before **October 6, 2014.**

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1           The District Court Executive is hereby directed to enter this Order, provide  
2 copies to counsel, and mail a copy to all unrepresented Defendants at their  
3 addresses of record.

4           **DATED** September 3, 2014.



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*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge