

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CHARA CURTIS, et al.,

Plaintiffs,

V.

## ILLUMINATION ARTS, INC., et al.,

## Defendants.

CASE NO. C12-0991JLR

ORDER ON PLAINTIFFS'  
SECOND MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT AND SECOND  
MOTION FOR SANCTIONS

## I. INTRODUCTION

Before the court are two motions: (1) Plaintiffs Chara Curtis, Cynthia Aldrich, and Alfred Currier's second motion for partial summary judgment (2d SJ Mot. (Dkt. # 32)); and (2) Plaintiffs' second motion for sanctions (2d Sanc. Mot. (Dkt. # 30)). The court has considered both motions, all submissions filed in support of and opposition to

1 the motions, the balance of record, and the applicable law. Being fully advised,<sup>1</sup> the  
2 court GRANTS in part and DENIES in part Plaintiffs' second motion for partial  
3 summary judgment and GRANTS in part and DENIES in part Plaintiffs' second motion  
4 for sanctions.

5 **II. BACKGROUND**

6 **A. Plaintiffs' Second Motion for Partial Summary Judgment**

7 This case involves claims for breach of contract and copyright infringement. (*See*  
8 *generally* Compl. (Dkt. # 1).) On May 29, 2013, the court granted in part and denied in  
9 part Plaintiffs' first motion for partial summary judgment. (*See* 5/29/13 Order (Dkt.  
10 # 29).) The court ruled that Defendants Illumination Arts, Inc. ("IAI") and Illumination  
11 Arts Publishing, LLC ("IAP") are liable to Plaintiffs for breach of contract. (*Id.* at 10,  
12 13.) The court ruled that IAP is liable for IAI's breach of contract because it is a mere  
13 continuation of IAI and that both entities will be subject to the same liability with respect  
14 to Plaintiff's claims because the corporate veil between IAI and IAP has been pierced.  
15 (*Id.* at 13, 18.) The court declined to pierce the corporate veil with respect to Defendants  
16 John Thompson's and Kimmie Lynn Thompson's personal liability because there was no  
17 evidence before the court that either of the Thompsons personally dissipated any of IAI's  
18 or IAP's assets or that their activities actually harmed Plaintiffs. (*Id.* at 18-19.) Finally,  
19 the court ruled that all Defendants were liable for copyright infringement and that the

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<sup>1</sup> No party has requested oral argument with respect to either motion. The court deems  
22 both motions to be appropriate for disposition without oral argument.

1 infringement was willful. (*Id.* at 19-23.) Based on the foregoing, the court also granted  
2 Plaintiffs a permanent injunction and ordered Defendants to return to Plaintiffs all  
3 infringing copies of Plaintiffs' books. (*Id.* at 23-24.) Plaintiffs now seek an additional  
4 order on summary judgment with respect to damages for breach of contract and statutory  
5 damages for willful copyright infringement. (*See generally* 2d SJ Mot.)

6 With respect to breach of contract damages, Plaintiffs assert that between 1998  
7 and 2011, Defendants sold 77,869 copies of the books at issue: (1) 4,786 copies of *How*  
8 *Far to Heaven?*, (2) 19,328 copies of *Fun Is a Feeling*, and (3) 53,755 copies of *All I See*  
9 *Is a Part of Me*. (*See* 6/5/13 Kruckeberg Decl. re: SJ (Dkt. # 34) Exs. A-C.) The retail or  
10 list price for each book is \$15.95. (*See id.*; 3/28/13 Kruckeberg Decl. (Dkt. # 24) Ex. J.)  
11 The publishing agreements for *Fun Is a Feeling* provide that each author is to receive a  
12 royalty of 5% for the first 10,000 copies sold and 6.25% for the next 20,000 copies sold.  
13 (*Id.* Exs. F at 3, G at 4.) Similarly, the publishing agreements for *How Far to Heaven?*  
14 provide for each author to receive a royalty of 5% for the first 10,000 copies sold and  
15 6.25% for the next 20,000 copies sold. (*Id.* Exs. D at 3-4, E at 4.) Accordingly, Plaintiffs  
16 calculate their royalty rate for all sales of all books as follows: \$53,526.61 for Mr. Curtis,  
17 \$49,709.77 for Ms. Aldrich, and \$3,816.84 for Mr. Currier. (*See* 2d Sanc. Mot. at 9-10.)  
18 Comparing these figures to available tax records, Plaintiffs also calculate that Mr. Curtis  
19 was underpaid \$5,790.84 or roughly 10.82%. (*See* 6/5/13 Curtis Decl. (Dkt. # 33) ¶ 3,  
20 Ex. A.)

21 Plaintiffs do not, however, provide direct evidence of the amount of royalty  
22 underpayments with respect to Ms. Aldrich and Mr. Currier. Rather, Plaintiffs infer that,

1 if Defendants had permitted an audit as required by the publishing contracts between  
2 Plaintiffs and IAI, Ms. Aldrich and Mr. Currier could have expected to find and recoup  
3 similar underpayments in the amounts of \$5,377.91 and \$412.93, respectively. (See Mot.  
4 at 10.)

5 Plaintiffs note that because the court denied their motion to pierce the corporate  
6 veil between the corporate entities, IAI and IAP, on the one hand, and the Thompsons, on  
7 the other hand, their claim for contract damages is limited to IAI and IAP. (See Mot. at 8,  
8 n.1.) However, if the court were to grant their pending motion for sanctions, then  
9 Plaintiffs would ask the court to find Mr. Thompson and Ms. Thompson jointly and  
10 severally liable with IAI and IAP. (See *id.*)

11 In addition to damages for their breach of contract claim, Plaintiffs seek \$150,000  
12 each as maximum statutory damages under 17 U.S.C. § 504(c)(1)-(2) for willful  
13 copyright infringement. (2d SJ Mot. at 4-5.) Defendants provided no argument or  
14 evidence in contradiction to Plaintiffs' evidence with respect to Plaintiffs' claimed  
15 contract and willful copyright infringement damages.

16 **B. Plaintiffs' Second Motion for Sanctions**

17 Plaintiffs have also moved separately for additional sanctions against Defendants.  
18 (See generally 2d Sanc. Mot.) On November 29, 2012, Plaintiffs served Defendants with  
19 a set of discovery requests that included interrogatories, requests for the production of  
20 documents, and requests for admission. (1/21/13 Kruckeberg Decl. (Dkt. # 17) ¶ 2,  
21 Ex. A.) By January 31, 2013, Plaintiffs had received no responses or objections to any of  
22 the discovery requests (*id.* ¶ 12), and they moved to compel responses and for sanctions

1 (see generally Mot. to Compel (Dkt. # 16)). Defendants filed no response to Plaintiffs'  
2 motion to compel. (See 2/20/13 Order (Dkt. # 19) at 3.) On February 20, 2013, the court  
3 granted Plaintiffs' motion to compel, found that Defendants had waived any objections to  
4 Plaintiffs' discovery requests, and ordered Defendants to "provide complete responses . .  
5 . no later than March 1, 2013." (*Id.* at 6, 8.) In addition, the court ordered Defendants to  
6 pay sanctions to Plaintiffs in the form of Plaintiffs' reasonable expenses and attorneys'  
7 fees incurred in bringing the . . . [discovery] motion." (*Id.* at 8.)

8 On February 20, 2013, the same day as the court's ruling on discovery and  
9 sanctions above, Defendants served their initial answers to Plaintiffs' discovery requests.  
10 (See 6/5/13 Kruckeberg Decl. re Sanc. (Dkt. # 31) Ex. A.) Despite the court's order  
11 stating that Defendants had waived any objections to Plaintiffs' discovery requests,  
12 Defendants objected to requests for production and interrogatories related to Ms.  
13 Thompson's financial records. (See *id.*) Between February 27 and February 29, 2013,  
14 Defendants began producing financial records relating to Mr. Thompson, IAI, and IAP,  
15 but they produced no information regarding Ms. Thompson's financial records. (*Id.* ¶ 6.)  
16 To date, Defendants have produced no documents or information related to Plaintiffs'  
17 discovery requests concerning Ms. Thompson. Plaintiffs assert that they have been  
18 prejudiced by Defendants' failure to produce any of the requested financial information  
19 concerning Ms. Thompson because Plaintiffs have been unable to establish their claim  
20 that the corporate veil should be pierced with respect to Ms. Thompson. (See 2d Sanc.  
21 Mot. at 4-5.) Indeed, the court previously declined to pierce the corporate veil with  
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1 respect to Ms. Thompson because “there [wa]s no evidence . . . that either of the  
2 Thompsons personally dissipated any of IAI’s or IAP’s assets.” (5/29/13 Order at 18.)

3 On June 20, 2013, after Plaintiffs had filed their present motion for sanctions, and  
4 after the discovery and dispositive motions cutoff,<sup>2</sup> Defendants finally produced copies of  
5 bank statements for IAP’s Chase checking and savings accounts (6/28/13 Kruckeberg  
6 Decl. (Dkt. # 41) ¶ 2, Ex. A), copies of bank statements for Mr. Thompson’s and  
7 Arrieana Thompson’s<sup>3</sup> Bank of America checking and savings accounts (*id.* ¶ 3, Ex. B),  
8 and copies of bank statements for IAI’s Bank of America checking and savings accounts  
9 (*id.* ¶ 4, Ex. C). Defendants, however, produced no records related to Ms. Thompson’s  
10 bank accounts.

11 Plaintiffs assert that this new evidence, produced after the dispositive motions  
12 deadline, contradicts or is in conflict with Mr. Thompson’s testimony in response to  
13 Plaintiffs’ initial motion for summary judgment that his bank accounts were never  
14 comingled with IAI or IAP bank accounts and that Defendants’ corporate forms were  
15 never abused or used for an improper purpose. (*See* 2d Sanc. Reply (Dkt. # 40) at 4  
16 (citing Thompson Decl. (Dkt. # 26) ¶¶ 10, 16-17; 6/28/13 Kruckeberg Decl. Ex. A).)  
17 Plaintiffs assert that the new evidence demonstrates that Mr. Thompson freely transferred  
18 funds between his personal account and IAI’s bank account in the months before he  
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20 <sup>2</sup> The discovery cutoff was May 6, 2013. (*See* Sched. Ord. (Dkt. # 15) at 1.) The  
21 dispositive motions deadline was June 5, 2013. (*Id.*)

22 <sup>3</sup> Arrieana Thompson is Mr. Thompson’s former wife (*see* King Decl. (Dkt. # 38) Ex. 3 at  
36) and is not a party to this action.

1 closed IAI's Bank of America account. (*Id.* (citing 6/26/13 Kruckeberg Decl. Exs. B-C).)

2 Plaintiffs assert they have been prejudiced by Defendants' failure to comply with the

3 court's prior discovery order because, had this information been available sooner (*i.e.*,

4 before the dispositive motions deadline), Plaintiffs could have used it to support their

5 motion for summary judgment with respect to piercing the corporate veil and establishing

6 Mr. Thompson's personally liability. (*Id.* at 4, n.1.)

7 Defendants assert that they should not be sanctioned because they "have provided

8 at least 60 reports on the royalties due for the work and financial records, including tax

9 returns for the Defendants," and that "[a]dditional documents were similarly emailed to

10 Plaintiffs' counsel." (Resp. to Sanc. Mot. (Dkt. # 37) at 2 (citing King Decl. (Dkt. # 38)

11 Exs. 3, 5).) They do not deny, however, that the bank records cited above were provided

12 only after the discovery cutoff and dispositive motions deadline had expired. Defendants

13 also do not deny that they have not produced requested financial information related to

14 Ms. Thompson.

15 Defendants also assert that they offered an opportunity to Plaintiffs to review

16 additional records at Defendants' offices (which is also the Thompsons' home), but

17 Plaintiffs failed to avail themselves of this opportunity. (*Id.* at 2 (citing King Decl. Ex.

18 2).) Plaintiffs respond that, despite repeated inquiries, Defendants' counsel never

19 clarified how documents produced at their home were to be duplicated. (Reply to Sanc.

20 Mot. (Dkt. # 40) at 5.)

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### III. ANALYSIS

## A. Summary Judgment Motion

3 Summary judgment is appropriate if the evidence, when viewed in the light most  
4 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to  
5 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.  
6 P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of L.A.*,  
7 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing  
8 there is no genuine issue of material fact and that he or she is entitled to prevail as a  
9 matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden,  
10 then the non-moving party “must make a showing sufficient to establish a genuine  
11 dispute of material fact regarding the existence of the essential elements of his case that  
12 he must prove at trial” in order to withstand summary judgment. *Galen*, 477 F.3d at 658.  
13 The court is “required to view the facts and draw reasonable inferences in the light most  
14 favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).

15 Defendants filed a consolidated response to Plaintiffs' motions for summary  
16 judgment and for sanctions. (*See* Consol. Resp. (Dkt. # 37).) Nowhere in the responsive  
17 memorandum or in counsel's declaration (*see* King Decl. (Dkt. # 38)), however, do  
18 Defendants provide any evidence or argument in opposition to Plaintiffs' motion for  
19 summary judgment. Instead, the substance of Defendants' response is directed virtually  
20 entirely towards Plaintiffs' concurrently-filed motion for sanctions and discovery-related  
21 issues. (*See generally* Consol. Resp; King Decl.) Nevertheless, the court must still  
22 assess the substance of Plaintiffs' second motion for partial summary judgment and the

1 evidence they have submitted in support thereof to determine if they have met their initial  
2 burden of demonstrating the lack of a genuine dispute of material fact for trial. *See*  
3 *Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003) (holding that nonmoving  
4 party's failure to oppose summary judgment "does not excuse the moving party's  
5 affirmative duty under Rule 56 to demonstrate its entitlement to judgment as a matter of  
6 law").

7 **1. Contract Damages**

8 The court finds that Plaintiffs have submitted unopposed evidence in support of  
9 their motion for summary judgment and met their initial burden of demonstrating their  
10 entitlement to judgment as a matter of law with respect to Mr. Curtis's claim that he was  
11 underpaid \$5,790.84 with respect to royalty payments he was entitled to receive from IAI  
12 or IAP under his publishing contract. (*See* 6/5/13 Curtis Decl. (Dkt. # 33) ¶ 3, Ex. A.)  
13 Accordingly, the court will grant Mr. Curtis's motion for summary judgment with respect  
14 to his claimed contract damages in this amount.

15 However, the court also finds that Plaintiffs have failed to meet their initial burden  
16 on summary judgment with respect to contract damages for either Ms. Aldrich or Mr.  
17 Currier. Here, Plaintiffs do not provide direct evidence of Ms. Aldrich's or Mr. Currier's  
18 contract damages but merely extrapolate based on the contract damages they found with  
19 respect to Mr. Curtis. (*See* 2d SJ Mot. at 10.) Further, Plaintiffs do not explain or  
20 provide evidence to support their assertion that "[i]f [] [D]efendants had allowed an audit,  
21 Ms. Aldrich and Mr. Currier could have expected to find and recoup similar  
22 underpayments [to those experienced by Mr. Curtis] in the amounts of \$5,377.91 and

1 \$412.93, respectively.” (*Id.*) Accordingly, the court denies Plaintiffs’ motion for  
2 summary judgment with respect to contract damages for Ms. Aldrich and Mr. Currier.  
3 The court’s ruling in this respect, however, is without prejudice to Plaintiffs re-filing a  
4 motion for partial summary judgment with respect to Ms. Aldrich’s and Mr. Currier’s  
5 contract damages as described below.

6 **2. Maximum Statutory Damages for Willful Copyright Violations**

7 A copyright owner may elect to recover statutory damages, rather than actual  
8 damages and additional profits of the infringer, “in a sum of not less than \$750 or more  
9 than \$30,000” for each copyright infringed. *See* 17 U.S.C. § 504(c)(1). If the copyright  
10 owner proves that the infringement was willful, the Copyright Act authorizes enhanced  
11 statutory damages of up to \$150,000.00 per infringed work. *See id.* § 504(c)(2). Here,  
12 the court has already determined on summary judgment that Defendants’ infringement of  
13 Plaintiffs’ copyrights was willful. (*See* 5/29/13 Order at 19-23.) Accordingly, Plaintiffs  
14 now seek a judgment of \$150,000.00 for each of their three copyright claims, totaling  
15 \$450,000.00 against all Defendants jointly and severally.<sup>4</sup> (*See* 2d SJ Mot. at 4-8; *see*  
16 *also* Prop. SJ Ord. (Dkt. # 32-1) at 2.)

17 A plaintiff may elect statutory damages regardless of the adequacy of the evidence  
18 offered as to his or her actual damages and the amount of the defendant’s profits.

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21 <sup>4</sup> Plaintiffs seek a joint and several judgment against Defendants in favor of Mr. Curtis  
22 and Ms. Aldrich in the amount of \$300,000.00 for willful copyright infringement, and a joint and  
several judgment against Defendants in favor of Mr. Curtis and Mr. Currier in an amount of  
\$150,000.00. (*See* Prop. SJ Ord. (Dkt. # 32-1) at 2.)

1   1 *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259  
2   2 F.3d 1186, 1194 (9th Cir. 2001). “If statutory damages are elected, ‘[t]he court has wide  
3   3 discretion in determining the amount of statutory damages to be awarded, constrained  
4   4 only by the specified maxima and minima.’” *Peer Int’l Corp. v. Pausa Records, Inc.*,  
5   5 909 F.2d 1332, 1336 (9th Cir. 1990) (quoting *Harris v. Emus Records Corp.*, 734 F.2d  
6   6 1329, 1335 (9th Cir. 1984)). Nevertheless, the court is guided by “what is just in the  
7   7 particular case, considering the nature of the copyright, the circumstances of the  
8   8 infringement and the like.” *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336  
9   9 (9th Cir. 1990) (quoting *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 314 U.S. 228,  
10   10 232 (1952)). Because awards of statutory damages serve both compensatory and punitive  
11   11 purposes, a plaintiff may recover statutory damages “whether or not there is adequate  
12   12 evidence of the actual damages suffered by plaintiff or of the profits reaped by  
13   13 defendant.” *Harris*, 734 F.2d at 1335. Such an approach serves “‘to sanction and  
14   14 vindicate the statutory policy’ of discouraging infringement.” *Peer Int’l Corp.*, 909 F.2d  
15   15 at 1337 (quoting *Woolworth Co.*, 344 U.S. at 233).

16       Plaintiffs assert that an award of the statutory maximum is appropriate here  
17   because Defendants’ willful infringement was particularly egregious. (See 2d SJ Mot. at  
18   5-6.) Plaintiffs sent Defendants demand letters after having terminated their licensing  
19   agreement with respect to the books at issue. (See 5/29/13 Order at 6-7.) In one demand  
20   letter, Mr. Curtis even set out Section 502 of the Copyright Act in full, stating: “If you’re  
21   not familiar with copyright infringement penalties, you need to take a look. I’ve printed  
22   the basics below.” (Curtis Decl. (Dkt. # 23) Ex. J.) In any event, Defendants are in the

1 business of selling copyrighted books and so should be familiar with copyright  
2 requirements. *See Peer Int'l Corp.*, 909 F.2d at 1337 (affirming district court's  
3 imposition of maximum statutory damages for willful infringement in part due to the  
4 number of willful infringements by defendant and the fact defendant was "engaged in the  
5 business of selling copyrighted works").

6 Plaintiffs also assert that an award of the statutory maximum is warranted due to  
7 Defendants' failure to participate in discovery and obstruction of the discovery process.  
8 (2d SJ Mot. at 6-7.) Plaintiffs assert that Defendants' obstructionist behavior has made it  
9 difficult, if not impossible, to ascertain the actual amount of Plaintiffs' damages for  
10 infringement. (*Id.* at 7.) Finally, Plaintiffs also assert that Defendants' wide, open-access  
11 distribution of their works on the Internet (*see* 5/29/13 Order at 7) favors imposition of  
12 maximum statutory damages. (*Id.* at 7-8.) Defendants offer no evidence or argument to  
13 contravene Plaintiffs' position on statutory damages.

14 Despite the fact that Defendants have offered virtually no response to Plaintiffs'  
15 motion for summary judgment, the determination of whether Plaintiffs are entitled to an  
16 award of maximum statutory damages for willful copyright infringement is inherently  
17 discretionary, and therefore the court cannot enter summary judgment on this issue. The  
18 court's conclusion in this regard arises out of the logical extension of a 1998 Supreme  
19 Court decision. In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355  
20 (1998), the Supreme Court held that a claim for statutory damages under § 504(c) of the  
21 Copyright Act, 17 U.S.C. § 504(c), is a suit at law to which the Seventh Amendment  
22 applies. *See also GoPets Ltd. v. Hise*, 657 F.3d 1024, 1034 (9th Cir. 2011) ("[T]he

1      Seventh Amendment provides a right to a jury trial both as to liability and as to the  
2      amount of actual copyright damages, even though the copyright statute does not so  
3      provide.”). This does not mean, however, that a jury must resolve every issue in a  
4      copyright dispute, as Defendants similarly argued in response to Plaintiffs’ first motion  
5      for summary judgment (*see* Resp. to 1st SJ Mot. (Dkt. # 25) at 6-7). *BMG Music v.*  
6      *Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005). “When there are no disputes of material  
7      fact [with respect to an issue in a copyright action], the court may enter summary  
8      judgment without transgressing the Constitution.” *Id.* (citing *Fidelity & Deposit Co. v.*  
9      *United States*, 187 U.S. 315 (1902); *Galloway v. United States*, 319 U.S. 372 (1943);  
10     *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931)). As the Seventh  
11     Circuit explained in *BMG Music*:

12       We read *Feltner* as establishing no more (and no less) than that cases under  
13       § 504(c) are normal civil actions subject to the normal allocation of  
14       functions between judge and jury. When there is a material dispute of fact  
15       to be resolved or discretion to be exercised in selecting a financial award,  
16       then either side is entitled to a jury; if there is no material dispute and a rule  
17       of law eliminates discretion in selecting the remedy, then summary  
18       judgment is permissible.

19       430 F.3d at 892-93 (citing *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 65 n.7 (1st  
20       Cir. 2000)). Thus, this court could and did enter summary judgment with respect to the  
21       issues of copyright infringement and willfulness because there were no disputes of  
22       material fact with respect to those issues. (*See* 5/29/13 Order at 19-23 & n.8.)

23       The issue of imposing maximum statutory damages, however, is different in that it  
24       inherently involves an exercise of discretion by the fact finder. In *BMG Music*, because  
25       Plaintiffs had requested only the minimum statutory damages, the Seventh Circuit

1 concluded that the issue of damages could be properly decided on summary judgment.

2 *See BMG Music*, 430 F.3d at 892-93; *see also GoPets*, 657 F.3d at 1034 (discussing

3 *Feltner*, the Ninth Circuit held “that there is no right to a jury trial when a judge awards

4 the minimum statutory damages” and cited *BMG Music* with approval). Here, however,

5 Plaintiffs have not sought minimum statutory damages, but rather of \$150,000.00 per

6 work, which is the statutory maximum for a willful copyright violation. (*See* 2d SJ Mot.

7 at 8 (“Given the nature of the defendants’ infringement, the statutory maximum is a just

8 award and the plaintiffs should be awarded \$150,000 for each of their three copyright

9 claims.”). Even considering Plaintiffs’ undisputed evidence in favor of an award of the

10 statutory maximum, the selection of such an award requires the exercise of discretion by

11 the fact finder. In *BMG Music*, the Seventh Circuit stated that if the plaintiff “had

12 requested more than [the statutory minimum in damages] per work, then [the defendant]

13 would have been entitled to a trial.” 430 F.3d at 892. This is because “[w]hen there

14 is . . . discretion to be exercised in selecting a financial award, then either side is entitled

15 to a jury.” *Id.* This court agrees with the Seventh Circuit’s analysis in *BMG Music*, and

16 accordingly must deny Plaintiffs’ motion for summary judgment with respect to an award

17 of maximum statutory damages for Defendants’ willful copyright violations. This is an

18 issue that the court must reserve for the jury. *See also Matlow v. Solomon*, No. 04-6109-

19 HO, 2005 WL 309976, at \*2 (Feb. 7, 2005) (concluding that the Supreme Court’s holding

20 in *Feltner* “preclude[s] the court from determining statutory damages on summary

21 judgment”); *Ultra-Images, LLC v. Franclemont*, No. 05-60538-CIV, 2007 WL 4557148,

22 at \*5 (S.D. Fla. Dec. 20, 2007) (“[I]f infringement is found to be willful, a fact finder

1 must determine if enhanced statutory damages should be imposed. . . . Thus, the Court  
2 cannot make any determination regarding statutory damages at the summary judgment  
3 stage.”)<sup>5</sup>

4 **B. Sanctions Motion**

5 Due to Defendants’ failure to fully abide by the court’s prior order on discovery,  
6 Plaintiffs seek sanctions including either the entry of factual findings that “the  
7 Thompsons and their corporate entities are alter-egos and that Mr. and Mrs. Thompson  
8 dissipated corporate assets for personal expenses” or default judgment on all of Plaintiffs’  
9 claims. (2d Sanc. Mot. at 7.) Under Federal Rule of Civil Procedure 37(b)(2)(A), the

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11 <sup>5</sup> In *Microsoft Corp. v. Image & Bus. Solutions, Inc.*, No. CV 05-6807, 2007 WL  
12 2874430, at \*7-8 (C.D. Cal. May 4, 2007), the federal district court rejected defendants’  
13 argument that the court could award only the statutory minimum damages for non-willful  
14 infringement on summary judgment. The plaintiff had requested the statutory maximum in  
15 damages. *Id.* at \*7. The *Microsoft* court evaluated the plaintiff’s “undisputed” evidence of the  
16 defendants’ “egregious pattern of unlawful conduct and suspect business practices,” *see id.*, and  
17 concluded that “[w]hile . . . this conduct warrants a damages award toward the higher end of the  
18 statutory damages for non-willful infringement,” it did not justify an award of the statutory  
19 maximum. *Id.* Indeed, the court cut plaintiff’s request for damages in half. *Id.* at \*8. The  
20 *Microsoft* court’s resolution of the statutory damages issue underscores the discretionary nature  
21 of the issue and its consequent inappropriateness for resolution on summary judgment. This  
22 court also notes that in rejecting the Seventh Circuit’s decision in *BMG Music*, the *Microsoft*  
court stated that *BMG Music* was not binding authority and was contradicted by Ninth Circuit  
authority. The *Microsoft* court, however, relied upon Ninth Circuit authority that predated the  
Supreme Court’s decision in *Feltner*. *See Microsoft*, 2007 WL 2874430, at \*7 (citing *Peer Int’l*,  
909 F.2d at 1335; *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)). The  
only other decision cited by the *Microsoft* court in rejecting *BMG Music* simply affirmed the  
district court’s denial of defendant’s motion in limine to preclude a jury trial on statutory  
damages following remand by the Supreme Court in *Feltner* and is not in conflict with *BMG*  
*Music*. *See Microsoft*, 2007 WL 2874430, at \*7 (citing *Columbia Pictures Television, Inc. v.*  
*Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1192-93 (9th Cir. 2001)).  
Particularly in light of the Ninth Circuit’s recent reliance upon *BMG Music* while analyzing  
*Feltner*, *see GoPets*, 657 F.3d at 1034, this court cannot conclude that the rationale of the  
*Microsoft* court to decide a claim under the Copyright Act for maximum statutory damages on  
summary judgment remains viable.

1 court has discretion to impose “just” sanctions against a party for failure to obey an order  
2 to permit or provide discovery. Fed. R. Civ. P. 37(b)(2)(A). Specifically, Rule  
3 37(b)(2)(A) provides that “[i]f a party or a party’s officer, director, or managing  
4 agent . . . fails to obey an order to provide or permit discovery . . . the court . . . may issue  
5 further just orders.” Fed. R.Civ. P. 37(b)(2)(A). “These may include . . . (ii) prohibiting  
6 the disobedient party from supporting or opposing designated claims or defenses, or from  
7 introducing designated matters in evidence; [and] . . . (vi) rendering a default against the  
8 disobedient party.” *Id.* These sanctions are not available unless a court’s discovery order  
9 has not been obeyed. *Id.* “Also, “[i]nstead of or in addition to the orders above, the court  
10 must order the disobedient party, the attorney advising that party, or both to pay the  
11 reasonable expenses, including attorney’s fees, caused by the failure, unless the failure  
12 was substantially justified or other circumstances make an award of expenses unjust.”  
13 Fed. R. Civ. P. 37(b)(2)(C).

14 Under Rule 37(b)(2), sanctions such as default judgment or orders taking the  
15 plaintiff’s allegations as established are “appropriate only in ‘extreme circumstances’ and  
16 where the violation is ‘due to willfulness, bad faith, or fault of the party.’” *Fair Housing*  
17 *of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2000) (citations omitted); *Computer Task*  
18 *Group, Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir. 2004) (per curiam). Further, in  
19 deciding whether to grant such a motion for sanctions under subsections (A) through (C)  
20 of Rule 37(b)(2) for noncompliance with a discovery order, the court should consider five  
21 factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s  
22 need to manage its docket; (3) the risk of prejudice to [the party seeking sanctions]; (4)

1 the public policy favoring disposition of cases on their merits; and (5) the availability of  
2 less drastic sanctions.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1022 (9th  
3 Cir. 2002); *Computer Task Group, Inc.*, 364 F.3d at 1115.

4 Based on the factual record recited above, the court has little difficulty in  
5 concluding that Defendants’ failure to fully comply with the court’s prior discovery order  
6 was willful. Nevertheless, Defendants assert that they should not be sanctioned because  
7 “Plaintiffs have had ample opportunity to go on-site and review all of Defendants’  
8 records,” but they failed to do so. (See Resp. at 5.) Defendants’ documents, however,  
9 even if offered for review, were late in their production to Plaintiffs. The court ordered  
10 Defendants “to provide complete responses to Plaintiffs’ discovery requests . . . no later  
11 than March 1, 2013.” (2/20/13 Order at 8.) Defendants acknowledge that they did not  
12 offer them for production until the week of March 18, 2013. More importantly, as  
13 Plaintiffs note, Defendants present counsel’s March 1, 2013, email offering Defendants’  
14 documents for production out of context. (See Sanc. Reply at 5.) Counsel for both  
15 Plaintiffs and Defendants conferred just hours after Defendants’ counsel sent his March  
16 1, 2013 email. (6/5/13 Kruckeberg Decl. re Sanc. ¶ 9.) Plaintiffs’ counsel asked about  
17 the availability of duplication services and proposed sending the documents off-site for  
18 duplication. (*Id.*) Plaintiffs’ counsel responded that he would inquire with his clients.  
19 (*Id.*) Despite numerous follow-up inquiries from Plaintiffs’ counsel, Defendants never  
20 provided any clarification concerning duplication services and continued to put off  
21 arrangements for inspection and copying of their records. (*Id.* ¶¶ 10-20, Exs. G-N.)  
22

1        In any event, there is no indication in the record before this court that Defendants'  
2 offer to provide documents for inspection on-site included any of the financial  
3 information concerning Ms. Thompson that was requested by Plaintiffs. To the contrary,  
4 the evidence before the court is that Ms. Thompson still has not provided any answers to  
5 discovery regarding her finances. (6/5/13 Kruckeberg Decl. re Sanc. ¶ 20.)

6        Further, the court has no difficulty in concluding based on the foregoing factual  
7 record that Plaintiffs have been prejudiced by Defendants' conduct. Defendants'  
8 complete failure to provide any discovery regarding Ms. Thompson's financial  
9 information prevented Plaintiffs from establishing on summary judgment that the  
10 corporate veil between her and IAI and IAP should be pierced. (See 2d Sanc. Mot. at 4-  
11 5.) In addition, Plaintiffs assert that the evidence that Defendants produced after the  
12 dispositive motions deadline contradicts Mr. Thompson's statements in his prior  
13 declaration that the assets in his bank accounts were never commingled with the assets in  
14 IAI's or IAP's bank accounts (*see* Sanc. Reply (Dkt. # 40) at 4 (citing Thompson Decl.  
15 (Dkt. # 26) ¶ 16)) and that IAI and IAP had never been used for an improper purpose or  
16 their corporate forms abused (*id.* (citing Thompson Decl. ¶¶ 10, 17)).

17        Based on the foregoing, the court concludes that further sanctions are warranted.  
18 In its prior discovery order, the court warned Defendants that “[s]hould Defendants fail to  
19 produce the ordered discovery . . . within the timeframe stated . . . , the court w[ould]  
20 consider the imposition of additional sanctions.” (2/20/13 Order at 7.) Plaintiffs ask the  
21 court to impose sanctions including either an entry of default judgment on all claims or  
22 the entering of factual findings that “the Thompsons and their corporate entities are alter-

1    egos and that Mr. and Mrs. Thompson dissipated corporate assets for personal expenses.”

2    (2d Sanc. Mot. at 7.) In considering the factors outlined by the Ninth Circuit prior to the

3    imposition of such sanctions, however, the court concludes that something less than these

4    extraordinary sanctions are warranted. There is no question that the public’s interest in

5    expeditious resolution of litigation and the court’s need to manage its docket weigh in

6    favor of additional sanctions. As described above, there is also no question that Plaintiffs

7    have established that they have been prejudiced during the course of this litigation as a

8    result of Defendants’ obstreperous behavior in discovery. However, the public policy

9    favoring disposition of cases on the merits still favors the imposition of less drastic

10    sanctions, and despite Defendants’ continuing failure to pay monetary sanctions

11    previously ordered by the court (*see* 6/5/13 Kruckeberg Decl. re Sanc. ¶ 21), the court

12    believes that it can fashion a lesser sanction that will not only punish Defendants for their

13    conduct but also alleviate the prejudice Plaintiffs have experienced to date. In

14    determining that lesser sanctions than those sought by Plaintiffs are warranted at this

15    point, the court is mindful that Defendants produced at least a portion of the ordered

16    discovery.

17         Accordingly, the court orders Defendants to produce, without objection, all of the

18    financial records pertaining to Ms. Thompson that have been requested by Plaintiffs

19    within fourteen days of the date of this order and file a certification with the court that

20    they have done so. The certification should be signed not only by counsel for

21    Defendants, but also by Mr. Thompson and Ms. Thompson, in both their personal and

22    representative capacities for IAI and IAP. If Defendants fail to produce this discovery,

1 having now been ordered to do so twice, the court will consider entering a factual finding  
2 piercing the corporate veil between Ms. Thompson and the other Defendants. In  
3 addition, within the same timeframe, Defendants must produce any remaining  
4 outstanding discovery covered by the court's prior order (*see* 2/20/13 Order) and file a  
5 similar certification with the court that they have done so. If Defendants fail to file the  
6 foregoing certifications or fail to produce the ordered discovery within the timeframe  
7 described above, the court will consider imposing additional adverse evidentiary findings  
8 or the entry of default judgment against Defendants.

9 Following receipt of the foregoing discovery, the court further authorizes Plaintiffs  
10 to bring a third motion for partial summary judgment regarding the issue of piercing the  
11 corporate veil with respect to Mr. Thompson and/or Ms. Thompson, and with regard to  
12 contract damages for Ms. Aldrich and Mr. Currier—if the discovery produced by  
13 Defendants so warrants. If Defendants fail to timely comply with this order, the court  
14 authorizes Plaintiffs to bring a third motion for sanctions in which the court will consider  
15 the imposition of adverse evidentiary findings or the entry of default judgment against  
16 Defendants. Plaintiffs' third motion for partial summary judgment or for further  
17 sanctions, if any, shall be filed no later than 45 days following the date of this order.

18 Finally, Plaintiffs have requested the imposition of additional monetary sanctions.  
19 Under Federal Rule of Civil Procedure 37(b)(2)(C) the court “must order the disobedient  
20 party, the attorney advising that party, or both to pay the reasonable expenses, including  
21 attorney's fees, caused by the failure, unless the failure was substantially justified or  
22 other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C).

1 Defendants have failed to demonstrate that their failure to comply with the court's prior  
2 discovery order was substantially justified or that other circumstances make such an  
3 award unjust. The court can discern no just reason to deny Plaintiffs' request for  
4 additional monetary sanctions, and Defendants have offered none. Accordingly, the court  
5 grants Plaintiffs' request for additional monetary sanctions. The court orders both  
6 Defendants and their counsel to pay Plaintiffs' reasonable expenses, including attorney's  
7 fees, caused by Defendants' failure to comply with the court's prior discovery order. *See*  
8 Fed. R. Civ. P. 37(b)(2)(C). Within seven days of the date of this order, Plaintiffs shall  
9 submit a statement, along with appropriate documentation, concerning such reasonable  
10 expenses and attorney's fees. Defendants will have an additional seven days following  
11 Plaintiffs' submission to respond concerning the reasonableness of Plaintiffs' expenses  
12 and fees. After considering these additional submissions, the court will issue a further  
13 order regarding the specific amount of sanctions awarded to Plaintiffs.

14 The timeline that the court has outlined above with respect to possible additional  
15 motions for partial summary judgment renders obsolete the present trial date of  
16 September 3, 2013. It would only compound any prejudice to Plaintiffs to force them to  
17 go to trial on September 3, 2013 on an incomplete factual record caused by Defendants'  
18 obstreperous behavior in the discovery process. Accordingly, the court strikes the trial  
19 date. The court, however, recognizes that this detrimental effect on its calendar and trial  
20 schedule is caused by Defendants' conduct. The court places Defendants on notice that it  
21 will consider additional sanctions if there is any further delay in timely compliance with  
22 this court's orders. The court will reschedule the trial date, if necessary, following

1 consideration of Plaintiffs' third motion on partial summary judgment or for sanctions, if  
2 any.

3 **IV. CONCLUSION**

4 Based on the foregoing, the court GRANTS in part and DENIES in part Plaintiffs'  
5 second motion for partial summary judgment (Dkt. # 32) and GRANTS in part and  
6 DENIES in part Plaintiffs' second motion for sanctions (Dkt. # 30). Further, the court  
7 strikes the trial date, but will reschedule it, if necessary, as described above.

8 Dated this 18th day of July, 2013.

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12 JAMES L. ROBART  
United States District Judge  
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