

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CELL FILM HOLDINGS, LLC,

11 Plaintiff,

12 v.

13 BEVERLY ROGERS, *et al.*,

14 Defendants.
15

Case No. C16-1180RSL

ORDER GRANTING IN PART CELL
FILM HOLDINGS' MOTIONS FOR
DEFAULT JUDGMENT

16
17 **I. INTRODUCTION**

18 This matter comes before the Court on plaintiff Cell Film Holdings' motions for
19 default judgment against defendants Beverly Rogers (Dkt. #44), Kelly Ulrickfen (Dkt.
20 #46), Stephanie Spinella (Dkt. #48), Diana Wild (Dkt. #50), and Jennifer Domingo
21 (Dkt. #52). Having reviewed the relevant briefing and the remainder of the record, Cell
22 Film Holding's motions for default judgment are GRANTED IN PART and DENIED
23 IN PART.
24

25
26 **II. BACKGROUND**

27 The five motions for default judgment that are the subject of this Order are just a
28 portion of the more than one hundred default judgment motions filed by plaintiff's

ORDER GRANTING IN PART MOTIONS
FOR DEFAULT JUDGMENT - 1

1 counsel in twenty-six cases before the undersigned. All of the cases assert essentially
2 the same causes of action based on remarkably similar allegations, although the motion
3 picture at issue, the owner of the copyright, and the defendants vary. For purposes of
4 these motions, Cell Film Holding alleges that 30+ individual defendants unlawfully
5 infringed its exclusive copyright to the motion picture *CELL*, which it developed and
6 produced, by copying and distributing the film over the Internet through a peer-to-peer
7 network using the BitTorrent protocol. Plaintiff served internet service providers
8 (“ISP”s) with subpoenas in order to identify the alleged infringers. Amended complaints
9 identifying defendants by name were subsequently filed.
10
11

12 Defendants Rogers, Ulrickfen, Spinella, Wild, and Domingo (collectively
13 “Defendants”) are named in the same complaint because, given the unique identifier
14 associated with a particular digital copy of *CELL* and the timeframe in which the
15 internet protocol address associated with each Defendant accessed that digital copy, Cell
16 Film Holding alleges the named Defendants were all part of the same “swarm” of users
17 that reproduced, distributed, displayed, and/or performed the copyrighted work.
18 According to Cell Film Holding, Defendants directly or indirectly shared, downloaded,
19 and distributed a single unique copy of *CELL* that had been seeded to the torrent
20 network at some undefined point in the past.
21
22

23 Defendants did not respond to Cell Film Holding’s complaint. The Clerk of
24 Court therefore entered default against Defendants at Cell Film Holding’s request. See
25 Dkts. #38-42. Cell Film Holding now seeks judgment against each Defendant.
26
27
28

III. DISCUSSION

1
2 Federal Rule of Civil Procedure 55(b) authorizes a court to grant default
3 judgment. Prior to entering judgment in defendant’s absence, the Court must determine
4 whether the allegations of a plaintiff’s complaint establish his or her liability. Eitel v.
5 McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The court must accept all well-pled
6 allegations of the complaint as established fact, except allegations related to the amount
7 of damages. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).
8
9 Where the alleged facts establish a defendant’s liability, the court has discretion, not an
10 obligation, to enter default judgment. Alan Neuman Productions, Inc. v. Albright, 862
11 F.2d 1388, 1392 (9th Cir. 1988). If plaintiff seeks an award of damages, it must provide
12 the Court with evidence to establish the amount. TeleVideo Sys., 826 F.2d at 917-18.
13

A. Liability Determination.

14
15
16 The allegations in Cell Film Holding’s complaint establish Defendants’ liability
17 for direct copyright infringement. To establish direct infringement, Cell Film Holding
18 must demonstrate ownership of a valid copyright and that Defendants copied
19 “constituent elements of the work that are original.” L.A. Printex Indus., Inc. v.
20 Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012) (quoting Feist Publ’ns, Inc. v.
21 Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)). Here, Cell Film Holding alleges it
22 owns the exclusive copyright to the motion picture *CELL* and that Defendants
23 participated in a “swarm” to unlawfully copy and/or distribute the same unique copy of
24 *CELL*. These allegations were established by entry of default against Defendants.
25
26
27
28

1 Accordingly, Cell Film Holding has established Defendants' liability for direct
2 copyright infringement.

3 B. Default Judgment is Warranted.

4 Having established liability, plaintiff must also show that default judgment is
5 warranted. Courts often apply the factors listed in Eitel, 782 F.2d at 1471-72, to make
6 this determination. Those factors are:
7

8 “(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's
9 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money
10 at stake in the action; (5) the possibility of a dispute concerning material
11 facts; (6) whether the default was due to excusable neglect, and (7) the strong
12 policy underlying the Federal Rules of Civil Procedure favoring decisions on
the merits.”

13 The majority of these factors weigh in favor of granting default judgment against
14 Defendants. Cell Film Holding may be prejudiced without the entry of default judgment
15 as it will be left without a legal remedy. See Landstar Ranger, Inc. v. Parth Enters., Inc.,
16 725 F. Supp.2d 916, 920 (C.D. Cal. 2010). Cell Film Holding's complaint sufficiently
17 alleges a claim of direct copyright infringement, and Defendants did not present any
18 evidence or argument to the contrary. Additionally, the Court finds there is a low
19 probability that default against Defendants was due to excusable neglect: Defendants
20 were given ample opportunity to respond to the filings in this matter between the time
21 they were served with Cell Film Holding's complaint and the date of this Order. Finally,
22 although there is a strong policy favoring decisions on the merits, the Court may consider
23 Defendants' failure to respond to Cell Film Holding's requests for default and default
24 judgment as admissions that the motions have merit. LCR 7(b)(2).
25
26
27
28

1 The Court acknowledges that a dispute concerning the material facts alleged by
2 Cell Film Holding, including the identity of the alleged infringers, could arise in this
3 case. The Court also acknowledges that the amount at stake may be significant
4 depending on the means of each Defendant. Cell Film Holding seeks enhanced statutory
5 damages in the amount of at least \$1,500 along with attorneys' fees in excess of \$1,400
6 and costs in excess of \$85 from each individual Defendant. Notwithstanding these
7 considerations, the Eitel factors weigh in favor of granting default judgment against
8 Defendants.
9
10

11 C. Appropriate Relief.

12 Cell Film Holding requests entry of a default judgment against each Defendant
13 providing the following three categories of relief: (1) permanent injunctive relief;
14 (2) statutory damages; and (3) attorney's fees and costs. Each category is discussed
15 below.
16
17

18 i. *Permanent Injunctive Relief*

19 Permanent injunctive relief is appropriate. Section 502(a) of Title 17 of the
20 United States Code allows courts to "grant temporary and final injunctions on such
21 terms as it may deem reasonable to prevent or restrain infringement of a copyright." As
22 part of a default judgment, courts may also order the destruction of all copies of a work
23 made or used in violation of a copyright owner's exclusive rights. 17 U.S.C. § 503(b).
24 Given the nature of the BitTorrent protocol and Defendants' participation therein, the
25 Court finds Defendants possess the means to continue infringing in the future. MAI Sys.
26 Corp. v. Peak Comput., Inc., 991 F.2d 511, 520 (9th Cir. 1993) (granting permanent
27
28

1 injunction where “liability has been established and there is a threat of continuing
2 violations.”). Consequently, the Court will issue a permanent injunction enjoining
3 Defendants from infringing Cell Film Holding’s rights in *CELL* and directing them to
4 destroy all unauthorized copies of *CELL*.

6 ii. *Statutory Damages*

7 Plaintiff requests an award of statutory damages in the amount of at least \$1,500
8 against each Defendant for his or her participation in the BitTorrent swarm that resulted
9 in the unauthorized download and/or distribution of the seed file containing *CELL*.

10 Although the actual economic damages associated with a lost video rental are likely
11 minimal, plaintiff correctly points out that Congress has authorized statutory damages in
12 significant amounts to compensate for difficult-to-prove downstream losses and to deter
13 future infringement. Los Angeles News Serv. v. Reuters Int’l, Ltd., 149 F.3d 987, 996
14 (9th Cir. 1998) (quoting Peer Int’l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336
15 (9th Cir. 1990)). Under 17 U.S.C. § 504(c)(1), the Court may award statutory damages
16 “for all infringements involved in the action, with respect to any one work, . . . for
17 which any two or more infringers are liable jointly and severally, in a sum of not less
18 than \$750 or more than \$30,000 as the court considers just.” The Court has wide
19 discretion when determining the amount of statutory damages and takes into
20 consideration the amount of money requested in relation to the seriousness of the
21 defendant’s conduct, whether large sums of money are involved, and whether “the
22 recovery sought is proportional to the harm caused by defendant’s conduct.” Curtis v.
23
24
25
26
27
28

1 Illumination Arts, Inc., 33 F. Supp.3d 1200, 1212 (W.D. Wash. 2014) (citing Landstar,
2 725 F. Supp. 2d at 921).

3 Copyright violations come in all shapes and sizes, from the unauthorized copying
4 of a Halloween word puzzle for a child’s party to the unauthorized manufacture and sale
5 of millions of bootleg copies of a new release. While Defendants’ alleged copyright
6 violation is of concern in that it represents a theft of intellectual property, it is a
7 relatively minor infraction causing relatively minor injury. Cell Film Holding has not
8 shown that any of the Defendants is responsible for the “seed” file that made Cell Film
9 Holding’s copyrighted work available on the BitTorrent network, nor has Cell Film
10 Holding presented evidence that Defendants profited from the infringement in any way.
11 Given the range of statutory damages specified in the Copyright Act, the Court finds
12 that an award of \$750 for the swarm-related infringements involved in this action is
13 appropriate. Each of the Defendants is jointly and severally liable for this amount.
14
15
16
17

18 This award is in line with the awards made by other courts in the Ninth Circuit
19 and appears adequate to deter Defendants from infringing on plaintiff’s copyright in the
20 future.¹ Plaintiff argues that a significantly higher award is necessary to force people
21 like Defendants to appear and participate in these BitTorrent cases. Plaintiff apparently
22 wants the Court to raise the statutory damage award to an amount that is at or above the
23
24

25
26 ¹ Cell Film Holding has presented no evidence that Defendants will not be dissuaded from infringing in
27 the future. The judgment entered in this case, including statutory damages, attorney’s fees, and costs, may
28 be recovered by garnishing Defendants’ wages and/or seizing and selling their non-exempt property. This
is a steep penalty for having been too lazy to go to the local Redbox or too cheap to pay a few dollars for
an authorized download. Plaintiff offers no evidence to support its contention that personal liability for a
judgment in excess of \$500 is of no consequence to the judgment debtor.

1 anticipated costs of defending this action. A defendant may, however, decide that
2 conceding liability through default is the best course of action given the nature of the
3 claims and the available defenses. The “punishment” for that choice is the entry of
4 default judgment and an award of damages under the governing standards. As discussed
5 above, those standards lead to the conclusion that the minimum statutory penalty should
6 apply in this case. Plaintiff offers no support for the proposition that participation in
7 federal litigation should be compelled by imposing draconian penalties that are out of
8 proportion to the harm caused by Defendants’ actions or any benefits derived therefrom.
9
10 Statutory damages are not intended to serve as a windfall to plaintiffs and will not be
11 used to provide such a windfall here.
12

13
14 The Court will award Cell Film Holding \$750 in statutory damages for the
15 infringements involved in this action, for which defendants are jointly and severally
16 liable.
17

18 iii. *Attorneys’ Fees and Costs*

19 Finally, Cell Film Holding asks the Court to award between \$1,487.00 and
20 \$1,565.50 in attorneys’ fees and between \$110.00 and \$225.00 in costs against each
21 Defendant in this matter. Pursuant to 17 U.S.C. § 505, the Court “in its discretion may
22 allow the recovery of full costs by or against any party,” and “may also award a
23 reasonable attorney’s fee to the prevailing party as part of the costs.”
24
25

26 The Court agrees that Cell Film Holding should be awarded attorneys’ fees.
27 Courts consider several factors, including “(1) the degree of success obtained,
28 (2) frivolousness, (3) motivation, (4) objective unreasonableness (legal and factual), and

1 (5) the need to advance considerations of compensation and deterrence,” when making
2 attorneys’ fee determinations under the Copyright Act. Smith v. Jackson, 84 F.3d 1213,
3 1221 (9th Cir. 1996) (citing Jackson v. Axton, 25 F.3d 884, 890 (9th Cir. 1994)).

4 Because Cell Film Holding has succeeded on its non-frivolous direct infringement
5 claim² and because an award would advance considerations of compensation and
6 deterrence, Cell Film Holding is entitled to attorneys’ fees.
7

8
9 However, despite counsel’s efforts to allocate the fees and costs to each
10 individual defendant, the overall fee request is problematic. Courts determine the
11 amount of a fee award by determining a “lodestar figure,” which is obtained by
12 multiplying the number of hours reasonably expended on a matter by a reasonable
13 hourly rate. Intel Corp. v. Terabyte Int’l, Inc., 6 F.3d 614, 622 (9th Cir. 1993). Courts
14 may then adjust the lodestar with reference to factors set forth in Kerr v. Screen Extras
15 Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), to the extent those factors are not
16 already subsumed in counsel’s hourly rates or the number of hours expended on the
17 litigation. The relevant Kerr factors here are: (1) the time and labor required; (2) the
18 novelty and difficulty of the questions; and (3) the skill requisite to perform the legal
19 services properly.
20
21
22

23 1. *Reasonableness of Rate Requested*

24 In the Ninth Circuit, the determination of a reasonable hourly rate “is not made
25 by reference to rates actually charged the prevailing party.” Chalmers v. City of Los
26

27
28 ² Despite the entry of default, the Court specifically declines to enter judgment in plaintiff’s favor on its indirect and contributory infringement claims.

1 Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The Court will exclude hours that are
 2 “excessive, redundant, or otherwise unnecessary” and therefore not reasonably
 3 expended. Id. at 434. Counsel has attempted to calculate the hours spent in connection
 4 with Cell Film Holding’s claims against each individual Defendant by dividing the total
 5 number of hours spent on collective efforts by the total number of defendants at the time
 6 the action was taken. Time spent working solely in pursuit of claims against an
 7 individual are allocated wholly to that individual. Dkt. #45 at ¶10. Taking Rogers as an
 8 example, counsel seeks compensation for the following activities:
 9
 10

Activity	Attorney Time	Legal Assistant Time
Review evidence of BitTorrent activity giving rise to potential claims	.4 hours	
Prepare complaint and supporting exhibits	.4 hours	
Prepare and file motion to expedite discovery	.4 hours	
Communicate with client	.1 hours	
Review Court orders	.2 hours	
Prepare subpoena and letter to ISPs	.1 hours	.3 hours
Review ISP response and prepare communications with Defendant	.2 hours	.3 hours
Review Defendant’s “status and history”	.3 hours	
Prepare amended complaint and review	.6 hours	
Prepare, review, and file waivers and/or summons	.1 hours	.3 hours
Review file	≈ .1 hours	
Prepare and file motion for default	≈ .2 hours	
Prepare and file motion for default judgment	1 hour	
Total:	4.1 hours	.9 hours

25
 26 These seemingly modest time expenditures mask the reality of counsel’s fee request.

27 Until recently, the BitTorrent cases filed in this district all proceeded in a similar
 28

1 manner.³ The original complaints list Doe defendants, identified only by IP addresses,
2 and allege infringement of the client’s exclusive rights in a specified motion picture.
3 Groups of Doe defendants are named in the same complaint because they allegedly
4 infringed the same digital copy of the copyrighted material by participating in the same
5 BitTorrent “swarm.” The nearly identical complaints are accompanied by nearly
6 identical motions for expedited discovery. Once the Court grants leave to conduct
7 expedited discovery, subpoenas are served on the ISP associated with the addresses
8 identified in the log attached to the complaint as Exhibit B. Once in possession of the
9 Doe defendants’ identities, counsel attempts to obtain a settlement of the claims and
10 files amended complaints against any non-settling defendants. Service, additional
11 settlements, and defaults/default judgments follow, with the exception of a handful of
12 defendants who are actively litigating the cases in this district. On occasion, counsel
13 seeks an extension of time in which to serve.
14
15
16
17

18 Almost every filing in this cause of action was essentially copied from scores of
19 other cases filed by the same counsel. There is nothing wrong with utilizing form
20 documents to pursue identical infringement claims arising from identical activities. As
21 has been previously noted, however, it is wrong for Cell Film Holding’s counsel to file
22 identical complaints and motions with the Court and then expect the Court to believe
23 that he labored over each filing. LHF Prods., C16-1175RSM, Dkt. #73 at 12. To arrive
24 at his per Defendant fee request, counsel divided time entries related to specific
25
26

27 ³ The Honorable Thomas S. Zilly has required certain additional disclosures or proffers in BitTorrent
28 cases pending before him. See Venice PI, LLC v. O’Leary, C17-0988TSZ, Dkt. # 32.

1 activities by the number of defendants then in the case. When the relatively small time
2 allotments set forth in counsel’s declaration related to Rogers are multiplied by the
3 number of defendants, counsel is seeking compensation for an excessive number of
4 hours. Counsel apparently spent 4 hours studying the log of infringing transactions and
5 IP addresses that gave rise to this particular lawsuit.⁴ He spent another 4 hours
6 generating a complaint that is virtually identical to the complaints Cell Film Holding
7 filed in other cases (not to mention the scores of BitTorrent cases filed on behalf of
8 other clients). Altering the form complaint to initiate a new lawsuit is, at this point, a
9 word processing chore: the preparer checks to make sure the correct plaintiff and film
10 are identified, changes the number of Doe defendants in the caption, inserts the correct
11 IP addresses in the section of the complaint describing the defendants, and attaches the
12 investigator’s log regarding the relevant swarm as Exhibit B. Charging 4 hours of
13 attorney time for this task is unreasonable. Counsel seeks to recover fees for another 4.8
14 hours spent preparing an amended complaint that was identical to the original except for
15 the caption and the correlation of the IP addresses with the subscribers’ names.

20 A form pleading and motions practice such as this simply does not take the type
21 of expertise or time that is normally associated with intellectual property matters. Nor
22 does it justify the number of cumulative hours that counsel seeks here. Having reviewed
23 the billing records and dockets in this and other similar matters, the Court finds that the
24 bulk of the “legal” work in these cases was performed and compensated years ago, that
25
26

27
28

⁴ This case was originally filed against ten Doe defendants.

1 these actions now involve far more word processing than drafting or legal analysis, and
2 that the attorney time necessary to tailor documents to each case and/or individual is
3 minimal. The Court will award 1 hour, at an hourly rate of \$350, to compensate Cell
4 Film Holding for counsel's time spent pursuing its claims against each named
5 Defendant, and .9 hours, at an hourly rate of \$145.00, to compensate Cell Film Holding
6 for legal assistant time altering pleadings, motions, and service documents. The Court is
7 satisfied that an attorneys' fee of \$480.50 per Defendant is reasonable and sufficient to
8 cover the form-pleading work required by this case.
9
10

11 3. *Costs*

12 Cell Film Holding requests between \$110.00 and \$225.00 in costs from each
13 Defendant. Recovery of a pro rata portion of the filing fee and the individual costs
14 associated with the third-party subpoena and service is appropriate.
15
16

17 **IV. CONCLUSION**


18 The Court, having reviewed the motions for default judgment and the remainder
19 of the record, finds adequate bases for default judgment. Accordingly, the Court hereby
20 finds and ORDERS:
21

- 22 1. Cell Film Holding's motions for default judgment are GRANTED IN PART
23 and DENIED IN PART.
- 24 2. Defendants Rogers, Ulrickfen, Spinella, Wild, and Domingo are hereby
25 permanently enjoined infringing Cell Film Holding's exclusive rights in the
26 motion picture film *CELL*, including without limitation by using the Internet
27 to reproduce or copy *CELL*, to distribute *CELL*, or to make *CELL* available
28 for distribution to the public, except pursuant to lawful written license or with
the express authority of Cell Film Holding;

- 1 3. To the extent any unauthorized reproduction or copy of *CELL* is in
2 Defendants' possession or subject to their control, they are directed to destroy
3 it;
- 4 4. Defendants are jointly and severally liable for statutory damages in the
5 amount of \$750;
- 6 5. Defendant Beverly Rogers is individually liable for attorneys' fees in the
7 amount of \$480.50 and costs in the amount of \$155.00.
- 8 6. Defendant Kelly Ulrickfen is individually liable for attorneys' fees in the
9 amount of \$480.50 and costs in the amount of \$160.00.
- 10 7. Defendant Stephanie Spinella is individually liable for attorneys' fees in the
11 amount of \$480.50 and costs in the amount of \$225.00.
- 12 8. Defendant Diana Wild is individually liable for attorneys' fees in the amount
13 of \$480.50 and costs in the amount of \$160.00.
- 14 9. Defendant Jennifer Domingo is individually liable for attorneys' fees in the
15 amount of \$480.50 and costs in the amount of \$110.00.

16 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment as
17 specified in this Order.

18
19 Dated this 14th day of March, 2019.

20
21 
22 Robert S. Lasnik
23 United States District Judge
24
25
26
27
28