

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SCOTT GUNNELLS, an individual,

Plaintiff,

v.

MICHAEL JOSEPH TEUTUL, an individual;
PAUL TEUTUL, an individual; ORANGE
COUNTY CHOPPERS, INC., a New York
Corporation; DISCOVERY, INC., a Delaware
Corporation.; PILGRIM MEDIA GROUP,
LLC, a Delaware Limited Liability Company;
and DOES 1-10,

Defendants.

Civil Action No.: 1:19-cv-05331-JSR

Civil Action No.: 1:19-cv-05312-JSR

**NOTICE OF MOTION FOR DEFAULT
JUDGMENT AGAINST DEFENDANTS
MICHAEL JOSEPH TEUTUL, PAUL
TEUTUL, AND ORANGE COUNTY
CHOPPERS, INC.**

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR RESPECTIVE
COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to this Court’s Order for the default judgment hearing scheduled for February 13, 2020 at 9:00 a.m., Plaintiff Scott Gunnells (“Gunnells” or “Plaintiff”) will and hereby does request entry of default judgment against Defendants Michael Joseph Teutul, an individual (“Mikey Teutul”); Paul Teutul, an individual (“Paul Teutul”); and Orange County Choppers, Inc., a New York corporation (“OCC”).

This motion is made on the grounds that:

1. Mikey Teutul, Paul Teutul, and OCC were and are named Defendants in this action via Plaintiff’s First Amended Complaint (“FAC”) which Gunnells filed on August 30, 2019 (*see* Dkt. #35);
2. OCC was served with the FAC and Summons on September 25, 2019 (*see* Dkt. #47),
Mikey Teutul and Paul Teutul were served with the FAC and Summons on

- September 27, 2019 (*see* Dkt. #45, and #46), and Defendants have not responded to either the FAC or otherwise appeared in this action;
3. Gunnells submitted a request to the Clerk to enter default against Mikey Teutul, Paul Teutul, and OCC on January 29, 2020 (*see* Dkt. #52);
 4. Mikey Teutul, Paul Teutul, and OCC are not infants, incompetent persons, in military service, or otherwise exempted under the Soldiers' and Sailors' Civil Relief Act of 1940;
 5. Plaintiff is now entitled to judgment against Mikey Teutul, Paul Teutul, and OCC as to the claims pleaded in the FAC, namely, copyright infringement and violations of the Digital Millennium Copyright Act;
 6. Gunnells seeks actual damages in the amount of \$25,000.00 per infringement for a total actual damages award of \$250,000.00;
 7. Under the Copyright Act (17 U.S.C. § 101 *et seq.*), Plaintiff is entitled to recover costs incurred in this litigation relating to Mikey Teutul, Paul Teutul, and OCC, which amount to \$2,484.45;
 8. Plaintiff is further entitled to reasonable attorneys' fees (*see* 17 U.S.C. § 101 *et seq.*), which amount to \$6,000.00;
 9. Plaintiff also seeks pre- and post-judgment interest; and
 10. The proposed Clerk's Certificate of Default and notice of this motion and the amount requested were served on Mikey Teutul, Paul Teutul, and OCC on January 30, 2019, as required by Local Rule 55.2(c).

This Motion is based on this Notice, the Memorandum of Points and Authorities, the Declarations of Scott Alan Burroughs, Esq. and Scott Gunnells, the pleadings, and the exhibits

hereto (which include the proposed Clerk's Certificate of Default, a copy of the First Amended Complaint, and a proposed Order for Default Judgment pursuant to Local Rule 55.2(b)).

Dated: January 30, 2020

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SCOTT GUNNELLS, an individual,

Plaintiff,

v.

MICHAEL JOSEPH TEUTUL, an individual;
PAUL TEUTUL, an individual; ORANGE
COUNTY CHOPPERS, INC., a New York
Corporation; DISCOVERY, INC., a Delaware
Corporation.; PILGRIM MEDIA GROUP,
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Defendants.

Civil Action No.: 1:19-cv-05331-JSR

Civil Action No.: 1:19-cv-05312-JSR

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT AGAINST
MICHAEL JOSEPH TEUTUL, PAUL
TEUTUL, AND ORANGE COUNTY
CHOPPERS, INC.**

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I. INTRODUCTION

This motion concerns a case of copyright infringement by Defendants Michael Joseph Teutul (“Mikey Teutul”), Paul Teutul (“Paul Teutul”), and Orange County Choppers, Inc. (“OCC”) of copyrighted photographic works created and owned by Plaintiff Scott Gunnells (“Gunnells” or “Plaintiff”), who holds all rights thereto. Gunnells filed his First Amended Complaint (“FAC”) on August 30, 2019 (*see* Dkt. #35) and served the FAC on Mikey Teutul, Paul Teutul, and OCC on September 25, 2019 and September 27, 2019 (*see* Dkt. # 45, #46, and #47). Mikey Teutul, Paul Teutul, and OCC have not communicated with Gunnells and have not appeared in this action to defend themselves.

Gunnells now moves this Court to enter default judgment against Mikey Teutul, Paul Teutul, and OCC in the amount of \$258,484.45. This amount includes \$25,000.00 in an actual damages award for each instance willful copyright infringement totaling \$250,000.00, and \$6,000.00 in attorneys’ fees and \$2,484.45 in recoverable costs, as allowed by 17 U.S.C. § 101 *et seq.*

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Factual Background.

Gunnells is a photographer based in Pennsylvania. Declaration of Scott Gunnells (“Gunnells Decl.”) ¶ 2. Gunnells is the author of a large portfolio of photographic works. *Id.* Gunnells photographed Mikey Teutul, creating a series of photographs (the “Teutul Photographs”). The Teutul Photographs are the photographs at issue in this action. Gunnells registered the Teutul Photographs with the United States Copyright Office and received an approved registration certificate. *Id.* at 4, Ex. 2.

In October of 2017, Gunnells discovered that Mikey Teutul, Paul Teutul, and OCC were exploiting the Teutul Photographs to promote various events, displaying the Teutul Photographs on the television show *American Choppers*, and selling apparel bearing a derivative of the Teutul Photographs (“Infringing Product”), all without Gunnells’ permission. Gunnells Decl. ¶ 5. Gunnells did not authorize these uses of the Teutul Photographs and had not entered into any licensing or royalty agreement that would allow the Teutul Photographs to be exploited for commercial use, displayed on *American Choppers*, or used on the Infringing Product. *Id.* Gunnells also discovered that Mikey Teutul, Paul Teutul, and OCC were displaying, publishing, and distributing the Teutul Photographs after having removed Plaintiff’s attribution and copyright management information (“CMI”) and thereafter displaying, publishing, and distributing the Teutul Photographs with false attribution and/or CMI identifying Mikey Teutul as the author of the Teutul Photographs. Gunnells Decl. ¶ 7. Subsequent to Gunnells’ discovery of Mikey Teutul, Paul Teutul, and OCC’s substantial involvement in the infringement at issue, Gunnells initiated this lawsuit. Gunnells intended to uncover, through discovery, not only how many times the Teutul Photographs were exploited or how much Infringing Product was sold by Mikey Teutul, Paul Teutul, and OCC, but also what manufacturers, vendors, retailers, and/or intermediaries bought and/or sold Infringing Product, or otherwise engaged in the network of infringement of the Teutul Photographs. This information is essential to allow Gunnells to take reasonable steps to thwart future infringements of his prolific and popular body of work. Unfortunately, Mikey Teutul, Paul Teutul, and OCC’s refusal to participate in the instant action prevents Gunnells from discovering such information and to take reasonable steps to protect his intellectual property.

B. Procedural Background.

Gunnells filed his initial complaint against Mikey Teutul, Paul Teutul, and OCC in the U.S. District Court for the Southern District of New York on June 6, 2019 (*see* Dkt. #1). Plaintiff served the Complaint on Mikey Teutul, Paul Teutul, and OCC on June 13, 2019 (*see* Dkt. #11, #13, and #14). Plaintiff filed a statement of relatedness indicating that the Complaint was related to Case No. 1:19-cv-05312 (“Second Complaint”) on July 2, 2019 (*see* Dkt. #17). The Complaint and the Second Complaint were accepted as related on July 8, 2019.

Gunnells moved for default judgment on August 7, 2019 (*see* Dkt. #28). The Court denied Gunnells’ motion but issued an order allowing Gunnells to amend his Complaint on August 15, 2019 (*see* Dkt. #32). Gunnells filed his FAC on August 30, 2019 (*see* Dkt. #35). He served the FAC on Paul Teutul and Mikey Teutul on September 27, 2019 (*see* Dkt. #45 and #46) and OCC on September 25, 2019 (*see* Dkt. #47). Mikey Teutul, Paul Teutul, and have yet to meaningfully appear in this action.

Gunnells requested a Certificate of Default from the Clerk as to Mikey Teutul, Paul Teutul, and OCC on January 29, 2020 (*see* Dkt. #52). Plaintiff now seeks an entry of default judgment for copyright infringement as to Mikey Teutul, Paul Teutul, and OCC.

III. ARGUMENT

A. The Court’s Granting of Default Judgment Against Mikey Teutul, Paul Teutul, and OCC is Proper.

Pursuant to Rule 55 of the Federal Rules of Civil Procedure, a party seeking default judgment must meet two requirements; first, the party must obtain a Certificate of Default from the clerk of courts, and second, the party must make an application to the Court for default judgment.

Gunnells has requested a Certificate of Default from the Clerk of Court and is in the process of satisfying the first requirement. Declaration of Scott Alan Burroughs, Esq. (“Burroughs Decl.”) ¶ 4, Ex. 5. In evaluating whether entry of default judgment is proper, a Court must determine that the moving party has adequately pleaded the elements of the cause of action for which it seeks default judgment. The Court must also consider: “1) whether the defendant’s default was willful; 2) whether defendant has a meritorious defense to the plaintiff’s claims; and 3) the level of prejudice the non-defaulting party would suffer as a result of the denial of the motion for default judgment.” *Mason Tenders Dist. Council Welfare Fund v. M & M Contracting & Consulting*, 193 F.R.D. 112, 114–15 (S.D.N.Y. 2000).

1. *Gunnells has Pled a Sufficient Cause of Action for Copyright Infringement Against Defendants Mikey Teutul, Paul Teutul, and OCC.*

Gunnells has brought a straight-forward copyright infringement claim against Defendants Mikey Teutul, Paul Teutul, and OCC related to Gunnells’ Teutul Photographs. To pursue a proper claim for copyright infringement, Gunnells must establish (a) ownership of a valid copyright in the work, and (b) that the defendant copied the work. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992). In order to prove a defendant’s copying, a plaintiff may use direct evidence or show that the defendant had access to the work and that the allegedly infringing work is substantially, or strikingly, similar to the plaintiff’s copyrightable material. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986). Upon entry of default, all the well-pleaded allegations of the complaint are accepted as true, and the moving party is entitled to all reasonable inferences from the evidence offered. *Au Bon Pain Corp. v. Arctect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981); see also *Finkel v. Romanowicz*, 577 F.3d 79, 84 (2d Cir. 2009).

a) Ownership of a Valid Copyright.

Gunnells satisfies the first prong of his claim based on his ownership of a valid copyright registration in the Teutul Photographs, namely U.S. Copyright Registration No. VAu 1-130-673. Gunnells Decl. ¶ 4, Ex. 2. As owner of this registration, Gunnells enjoys a presumption of validity in his copyright. *See* 17 U.S.C. § 410(c). And since Mikey Teutul, Paul Teutul, and OCC have not appeared in this case to challenge the validity of Gunnells' presumptively valid copyright, such presumption endures.

b) Access and Copying by Defendants Mikey Teutul, Paul Teutul, and OCC.

Gunnells also satisfies the second requirement for a copyright infringement claim by demonstrating that Mikey Teutul, Paul Teutul, and OCC had access to, and copied, his work. Gunnells' FAC sets forth adequately pled claims for copyright infringement against Defendants Mikey Teutul, Paul Teutul, and OCC. Gunnells alleges that he is the owner of a valid copyright in his Teutul Photographs (FAC ¶¶ 13, 16, 19, 22, 25, 28, 31, 34, 37), that Mikey Teutul, Paul Teutul, and OCC had access to the photographs directly from Gunnells (FAC ¶ 41), and that the Infringing Uses displayed, exploited, and published by and the Infringing Product sold and distributed by Mikey Teutul, Paul Teutul, and OCC bear prints that are substantially similar to Plaintiff's Teutul Photographs (FAC ¶¶ 11, 14, 17, 20, 23, 26, 29, 32, 35, 38). The FAC includes side-by-side comparisons of Gunnells' original Teutul Photographs and Defendants' infringing uses (FAC ¶¶ 12, 15, 18, 21, 24, 27, 30, 33, 36), demonstrating the substantial similarity between the two depictions. Such documents demonstrate not only Mikey Teutul, Paul Teutul, and OCC's access to Gunnells' Teutul Photographs, but also willfulness on the part of Mikey Teutul, Paul Teutul, and OCC to copy and illegally reproduce Gunnells' copyrighted photographs.

2. Entry of Default Judgment Considerations are in Favor of Plaintiff.

a) *Defendants' Failure to Appear was Willful.*

Gunnells served the Summons and FAC upon Mikey Teutul, Paul Teutul, and OCC's registered agent on September 25, 2019 and September 27, 2019 (*see* Dkt. #45, #46, and #47). Burroughs Decl. ¶ 3. Mikey Teutul, Paul Teutul, and OCC were thus served properly under New York law, and have not given any excuse for why they did not serve an Answer or otherwise respond to Plaintiff's FAC. Plaintiff's demonstrated proper service makes it apparent that Mikey Teutul, Paul Teutul, and OCC are well aware of the claims against them and that their failure to appear was willful.

b) *Defendants have no Meritorious Defense to Plaintiff's Claim for Copyright Infringement*

Since Mikey Teutul, Paul Teutul, and OCC have not appeared to defend themselves or their actions, they have not provided any defenses, meritorious or otherwise, for their infringing conduct. However, even if Mikey Teutul, Paul Teutul, and OCC had appeared to defend themselves, they could not have provided any meritorious defense to Gunnells' claims.

Gunnells has met his burden to demonstrate Defendants' liability for copyright infringement. Under tort theory, copyright infringement is a strict liability cause of action, as no showing of the defendant's state of mind is required. 2 *Paul Goldstein, Goldstein on Copyright* § 8.1 n.1 (3d ed. 2014). *See generally*, 17 U.S.C. § 501. Accordingly, no meritorious defense on the part of Mikey Teutul, Paul Teutul, and OCC would affect their liability under the Copyright Act.

c) *Gunnells Would be Highly Prejudiced by the Denial of the Motion for Default Judgment.*

In order to show prejudice, the non-defaulting party must show more than mere “delay” in obtaining relief. The non-defaulting party must demonstrate that denial of the motion for default judgment “may result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.” 10A *Charles A. Wright, et al., Fed. Practice & Procedure: Civil* § 2699, at 169 (3d ed.1998). Here, Gunnells has vigorously and fairly pursued his case and diligently noticed Mikey Teutul, Paul Teutul, and OCC of this pending litigation. Moreover, it is unlikely that there is any genuine dispute concerning the substantial similarity of the photographs, Mikey Teutul, Paul Teutul, and OCC’s access to Gunnells’ work or their willful copying of Gunnells’ Teutul Photographs. Gunnells has offered proof of all requisite copyright infringement elements in this case, and it would be highly prejudicial to Gunnells to now allow Mikey Teutul, Paul Teutul, and OCC to evade liability by simply ignoring the legal process and to prevent Gunnells from obtaining the damages to which he is entitled. If Gunnells is not permitted to obtain judgment against Mikey Teutul, Paul Teutul, and OCC, he is without any other recourse for recovery.

All three factors for consideration as set forth in *Mason Tenders* case favor Gunnells and the granting of default judgment against Mikey Teutul, Paul Teutul, and OCC in this case. *Mason Tenders Dist. Council Welfare Fund*, 193 F.R.D. at 114–15.

B. An Award of Statutory Damages, Actual Damages, Pre- and Post-Judgment Interest, Attorneys’ Fees and Costs is Appropriate.

Under Rule 54(c) of the Federal Rules of Civil Procedure, a default judgment “must not differ in kind from, or exceed in amount, what is demanded in the pleadings.” In his FAC,

Gunnells' prayer for relief includes requests that this Court assess enhanced statutory damages for willful copyright infringement pursuant to 17 U.S.C. § 504(c)(2), award Gunnells actual damages pursuant to 17 U.S.C. § 504, and award Gunnells' costs of suit and reasonable attorneys' fees pursuant to 17 U.S.C. § 505. (FAC Prayer for Relief ¶¶ b - e.)

Pursuant to 17 U.S.C. § 504(c), a plaintiff in an action for copyright infringement is entitled to statutory damages of "not less than \$750 or more than \$30,000" for "all infringements involved in the action, with respect to any one work...as the court considers just." 17 U.S.C. § 504(c)(1). If the "infringement was committed willfully," the court may increase the award of statutory damages up to a sum of \$150,000.00 per infringed work. 17 U.S.C. § 504(c)(2). "Statutory damages for copyright infringement are available without proof of plaintiff's actual damages or proof of any damages." *All-Star Mktg. Grp., LLC v. Media Brands Co.*, 775 F. Supp. 2d 613, 626 (S.D.N.Y. 2011).

In determining the appropriate level of statutory damages, the court looks at a number of factors in addition to willfulness, including the value of the copyright, expenses saved and profits gained by the defendant, lost revenues by the plaintiff, defendant's cooperation in providing records, and the need to deter the defendant and others from future infringing activity. *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986).

Mikey Teutul, Paul Teutul, and OCC's failure to answer or respond to the FAC frustrated Gunnells' ability to determine actual damages. Pursuant to 17 U.S.C. § 504(b), a plaintiff in an action for copyright infringement 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." 17 U.S.C. § 504(b). And, "[i]n establishing the infringer's profits, the copyright owner is required to present proof only

of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." Id. Since Mikey Teutul, Paul Teutul, and OCC have failed to appear, Gunnells has been unable to conduct appropriate discovery to obtain Defendants' business records to show their sales and profits from the infringing uses, and thus has been deprived of the opportunity to determine his actual damages. Thus, Mikey Teutul, Paul Teutul, and OCC's failure to appear justifies the imposition of statutory damages for at least two of the Teutul Photographs with timely registration. See *Sara Lee Corp. v. Bags of New York, Inc.*, 36 F.Supp.2d 161, 165 (S.D.N.Y. 1999). See also, *F. W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 231, 73 S. Ct. 222, 97 L. Ed. 276 (1952) (statutory damages are intended to allow "owner of a copyright some recompense for injury done to him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits").

Further, Gunnells has offered evidence of Mikey Teutul, Paul Teutul, and OCC's willful infringement. Mikey Teutul, Paul Teutul, and OCC exploited, published, displayed, distributed, and/or sold at least ten of Gunnells' Teutul Photographs, including one unlawful derivative, on the *American Choppers* television series, Defendants' social media accounts, Defendants' websites for their promotional events connected with the television series, and apparel for sale. Gunnells Decl. ¶ 5. An infringer should not be permitted to retain the unjust enrichment resulting from its unlawful acts by simply refusing to appear in court, resulting in a plaintiff's inability to determine actual damages. Gunnells' works have a high value attached to them, from which Gunnells draws his livelihood through license and royalty agreements, among other avenues. Indeed, Gunnells has negotiated licenses in the amounts of \$8,000.00 to \$15,000.00 for his photography. Gunnells Decl. ¶ 6. And Defendants' exploitation was worth more than \$250,000.00. Infringers like Mikey Teutul,

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Paul Teutul, and OCC should not be permitted to flout the law and reap the rewards gained by Gunnells' iconic work without properly remunerating Gunnells for their use of his work.

Gunnells could elect to pursue the maximum statutory damages award of \$150,000.00 per willful instance of copyright infringement for at least two Teutul Photographs, Subject Photograph A and Subject Photograph C. Nevertheless, based on a reasonable licensing fee for global worldwide all-media rights, Gunnells seeks \$25,000.00 per infringement, totaling \$250,000.00 for ten instances of copyright infringement. Awarding anything less than this amount would effectively reward Defendants' refusal to cooperate in this litigation. Gunnells' request is not unreasonable and accordingly should be granted in order to vindicate his claim for copyright infringement.

Similarly under the Copyright Act, a prevailing copyright owner may recover full costs and its reasonable attorneys' fees. 17 U.S.C. § 505. An award of attorney's fees is a matter of court discretion. *Matthew Bender & Co. v. W. Pub. Co.*, 240 F.3d 116, 121 (2d Cir. 2001). In his motion, Gunnells requests a very modest award of attorneys' fees and costs. In light of Defendants' default and Gunnells thus being the prevailing party in this lawsuit, an award of Gunnells' attorneys' fees is appropriate.

The Court must award post-judgment interest on any money judgment recovered in a civil case. *See* 28 U.S.C. § 1961; *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 83 (2d Cir. 2011). Post-judgment interest is measured "from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield ... for the calendar week preceding the date of the judgment," "computed daily to the date of payment" and "compounded annually." 28 U.S.C. § 1961(a)-(b).

IV. CONCLUSION

Based on all of the foregoing, Gunnells respectfully requests that the Court enter a default judgment against Mikey Teutul, Paul Teutul, and OCC and in favor of Gunnells, award actual damages under the Copyright Act in the amount of \$250,000.00 for copyright infringement, award pre- and post-judgment interest, and further award Gunnells his attorneys' fees and costs in the combined amount of \$6,800.00.

Dated: Brooklyn, NY
January 30, 2020

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