

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

<b>VIRGIN RECORDS AMERICA, INC.,</b>	)	
<i>et al.,</i>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>CIVIL ACTION 06-0639-WS-M</b>
	)	
<b>BERTHA LACEY,</b>	)	
	)	
<b>Defendant.</b>	)	

**ORDER**

This case is before the Court on plaintiffs’ Motion for Entry of Default Judgment (doc. 9).

**I. Background.**

On October 10, 2006, plaintiffs Virgin Records America, Inc., Motown Record Company, L.P., UMG Recordings, Inc.,<sup>1</sup> Sony BMG Music Entertainment, and BMG Music filed a Complaint for Copyright Infringement (doc. 1) against defendant, Bertha Lacey. In particular, plaintiffs maintained that Lacey had utilized an online media distribution system to download or distribute copyrighted music recordings belonging to plaintiffs, and/or to make such recordings available for distribution to others, thereby infringing on plaintiffs’ copyrights and exclusive rights under copyright. On that basis, the Complaint requested the following relief: (1) statutory damages pursuant to 17 U.S.C. § 504(c); (2) attorney’s fees and costs pursuant to 17 U.S.C. § 505; and (3) injunctive relief pursuant to 17 U.S.C. §§ 502 and 503, prohibiting Lacey from further infringing conduct and requiring her to destroy all copies of sound recordings made in violation of plaintiffs’ exclusive rights.

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<sup>1</sup> The Complaint lists UMG Recordings, Inc. as a plaintiff twice. The Court assumes that this redundancy was inadvertent, inasmuch as each UMG Recordings plaintiff is described in the Complaint as “a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California.” (Complaint, ¶¶ 6, 9.)

On November 14, 2006, plaintiffs filed a Return of Service (doc. 5) reflecting that defendant had been served with process by a private process server on October 26, 2006. According to the server's declaration, copies of the summons and complaint were left at Lacey's dwelling house or usual place of abode (6005 Howells Ferry Road, Mobile, AL 36618) and were given to Lacey's son, Brad Lacey.

Notwithstanding service of process in accordance with Rule 4(e), Fed.R.Civ.P., nearly three months ago, Lacey has never filed an answer or otherwise appeared in this action. Upon motion by plaintiffs, a Clerk's Entry of Default (doc. 8) was entered against Lacey on December 13, 2006 for failure to plead or otherwise defend. The Clerk of Court mailed a copy of that Entry of Default to defendant at the same address at which process was served. Once again, Lacey failed to respond. No further activity occurring in this matter in the subsequent 30 days, plaintiffs now seek entry of default judgment.

## **II. Analysis.**

### **A. Propriety of Default Judgment.**

In this Circuit, "there is a strong policy of determining cases on their merits and we therefore view defaults with disfavor." *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291, 1295 (11<sup>th</sup> Cir. 2003); *see also Varnes v. Local 91, Glass Bottle Blowers Ass'n of U.S. and Canada*, 674 F.2d 1365, 1369 (11<sup>th</sup> Cir. 1982) ("Since this case involves a default judgment there must be strict compliance with the legal prerequisites establishing the court's power to render the judgment."). Nonetheless, it is well established that a "district court has the authority to enter default judgment for failure ... to comply with its orders or rules of procedure." *Wahl v. McIver*, 773 F.2d 1169, 1174 (11<sup>th</sup> Cir. 1985).

Where, as here, a defendant has failed to appear or otherwise acknowledge the pendency of a lawsuit against her for some three months after being served, entry of default judgment may be appropriate. Indeed, Rule 55 itself provides for entry of default and default judgment where a defendant "has failed to plead or otherwise defend as provided by these rules." Rule 55(a), Fed.R.Civ.P. In a variety of contexts, courts have entered default judgments against defendants who

have failed to defend the claims against them following proper service of process. *See, e.g., In re Knight*, 833 F.2d 1515, 1516 (11<sup>th</sup> Cir. 1987) (“Where a party offers no good reason for the late filing of its answer, entry of default judgment against that party is appropriate.”); *Matter of Dierschke*, 975 F.2d 181, 184 (5<sup>th</sup> Cir. 1992) (“when the court finds an intentional failure of responsive pleadings there need be no other finding” to justify default judgment); *Kidd v. Andrews*, 340 F. Supp.2d 333, 338 (W.D.N.Y. 2004) (entering default judgment against defendant who failed to answer or move against complaint for nearly three months); *Viveros v. Nationwide Janitorial Ass'n, Inc.*, 200 F.R.D. 681, 684 (N.D. Ga. 2000) (entering default judgment against counterclaim defendant who had failed to answer or otherwise respond to counterclaim within time provided by Rule 12(a)(2)). In short, then, “[w]hile modern courts do not favor default judgments, they are certainly appropriate when the adversary process has been halted because of an essentially unresponsive party.” *Flynn v. Angelucci Bros. & Sons, Inc.*, 448 F. Supp.2d 193, 195 (D.D.C. 2006) (citation omitted).<sup>2</sup>

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<sup>2</sup> To be sure, courts have generally required some notice to be given to a defendant between the time of service of process and entry of default judgment. *See, e.g., International Brands USA, Inc. v. Old St. Andrews Ltd.*, 349 F. Supp.2d 256, 261 (D. Conn. 2004) (“Where a party fails to respond, **after notice** the court is ordinarily justified in entering a judgment against the defaulting party.”) (emphasis added and citations omitted); *F.T.C. v. 1263523 Ontario, Inc.*, 205 F. Supp.2d 205, 208 (S.D.N.Y. 2002) (entering default judgment where defendants had failed to respond in any way to summons, complaint and motion for default judgment); *New York State Teamsters Conference Pension and Retirement Fund v. Fratto Curbing Co.*, 875 F. Supp. 129, 131 (N.D.N.Y. 1995) (defendant that had failed to file answer to complaint or otherwise defend was properly notified of motion for default judgment). For unknown reasons, plaintiffs elected not to give Lacey notice of their efforts to secure a default against her, as their Motion for Entry of Default (doc. 7) was unaccompanied by a Certificate of Service or other indicia that plaintiffs had placed Lacey on notice that they were seeking entry of default. Nothing in the text of Rule 55 excuses the service requirement for requests for entry of default (as distinguished from motions for default judgment). Nonetheless, any harm arising from plaintiffs’ omission is negated by the fact that the Clerk of Court mailed a copy of the Clerk’s Entry of Default (doc. 8) to Lacey at the address where service was perfected. As such, Lacey is on notice that plaintiffs have moved forward with default proceedings, yet she has elected not to defend herself. Given Lacey’s failure to appear in this case, despite actual notice that this lawsuit was pending, that her responsive pleading was due by a date certain, and that a default had been entered against her, she is entitled to no further notice at this time. *See* Rule 55(b)(2) (defaulted defendant is entitled to notice of request for default judgment only if defendant has appeared in the action).

The law is clear, however, that Lacey's failure to appear and the Clerk's subsequent entry of default against her do not automatically entitle plaintiffs to a default judgment. Indeed, a default is not "an absolute confession by the defendant of his liability and of the plaintiff's right to recover," but is instead merely "an admission of the facts cited in the Complaint, which by themselves may or may not be sufficient to establish a defendant's liability." *Pitts ex rel. Pitts v. Seneca Sports, Inc.*, 321 F. Supp.2d 1353, 1357 (S.D. Ga. 2004); *see also Descent v. Kolitsidas*, 396 F. Supp.2d 1315, 1316 (M.D. Fla. 2005) ("the defendants' default notwithstanding, the plaintiff is entitled to a default judgment only if the complaint states a claim for relief"); *GMAC Commercial Mortg. Corp. v. Maitland Hotel Associates, Ltd.*, 218 F. Supp.2d 1355, 1359 (M.D. Fla. 2002) (default judgment is appropriate only if court finds sufficient basis in pleadings for judgment to be entered, and that complaint states a claim). Stated differently, "a default judgment cannot stand on a complaint that fails to state a claim." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1370 n.41 (11<sup>th</sup> Cir. 1997).

Review of the Complaint confirms that it does indeed assert detailed facts against Lacey, including a recitation of eight specific copyrighted recordings that Lacey has used and continues to use an online media distribution system to download and/or distribute without plaintiffs' permission. (Complaint, ¶¶ , Exh. A.)<sup>3</sup> The Complaint further states that plaintiffs are the copyright owners for those specific recordings. These facts, which are deemed admitted by virtue of Lacey's default, are sufficiently detailed and specific to give rise to a cognizable claim for direct copyright infringement in violation of the copyright laws of the United States, as codified at 17 U.S.C. §§ 101 *et seq.* *See generally In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7<sup>th</sup> Cir. 2003) (explaining that those who make and transmit digital copies of copyrighted music are direct infringers of those copyrights); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9<sup>th</sup> Cir. 2001) (prima facie case of direct infringement is shown where plaintiffs establish ownership of allegedly infringed material

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<sup>3</sup> Those recordings include Janet Jackson "This Time," Rick James "Fire and Desire," Dru Hill "5 Steps," Jennifer Lopez "If You Had My Love," Michael Jackson "Heal the World," Michael Jackson "You Rock My World," Tyrese "Lately," and Dru Hill "Beauty." (Complaint, at Exh. A.) The Complaint lists each of these recordings by reference to copyright owner (which in each instance is one of the named plaintiffs herein), album title, and SR#.

and demonstrate that alleged infringers are violating at least one exclusive right granted to copyright holders). Accordingly, the Court finds that the Complaint states a claim for relief.

The legal effect of Lacey's default is that she has now admitted the facts recited in the Complaint, which are sufficient to establish her liability to plaintiffs on a theory of copyright infringement.<sup>4</sup> Moreover, because she has made no attempt to defend this action in the three months since being served with process, despite notice that plaintiffs were moving forward with default proceedings against her, Lacey's course of conduct amounts to a deliberate and intentional failure to respond, which is just the sort of dilatory litigation tactic for which the default judgment mechanism was created. For these reasons, plaintiffs' Motion is **granted** as to entry of default judgment. Default judgment will be entered against Lacey, in accordance with Rule 55(b)(2), Fed.R.Civ.P. The Court will next consider which remedies which will be awarded to plaintiffs.

#### **B. Remedies.**

Plaintiffs seek three forms of relief, to-wit: minimum statutory damages, costs, and a permanent injunction. In considering these requests, the Court bears in mind that, notwithstanding the default against Lacey, "judgment may be granted only for such relief as may lawfully be granted upon the well-pleaded facts alleged in the complaint." *Pitts*, 321 F. Supp.2d at 1358 (citation omitted).<sup>5</sup> Each form

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<sup>4</sup> The effect of a default is to render all well-pleaded factual allegations of the complaint (except those relating to damages) admitted. See *Nishimatsu Const. Co. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5<sup>th</sup> Cir. 1975) ("defendant, by his default, admits the plaintiff's well-pleaded allegations of fact"); *McMillian/McMillian, Inc. v. Monticello Ins. Co.*, 116 F.3d 319, 321 (8<sup>th</sup> Cir. 1997) (explaining that "when a default judgment has been entered, facts alleged in the complaint ... may not be contested by the defaulted party").

<sup>5</sup> While well-pleaded facts in the complaint are deemed admitted, plaintiffs' allegations relating to the amount of damages are not admitted by virtue of default; rather, the court must determine both the amount and character of damages. *Miller v. Paradise of Port Richey, Inc.*, 75 F. Supp.2d 1342, 1346 (M.D. Fla. 1999); see also *Anheuser Busch, Inc. v. Philpot*, 317 F.3d 1264, 1266 (11<sup>th</sup> Cir. 2003) (federal law requires judicial determination of damages absent factual basis in record); *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151, 155 (2d Cir. 1999) (even where default judgment is warranted based on failure to defend, allegations in complaint with respect to damages are not deemed true, and district court must conduct inquiry in order to ascertain damages with reasonable certainty); *Patray v. Northwest Pub., Inc.*, 931 F. Supp. 865, 869-70 (S.D. Ga.

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