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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MICHAEL SCHMITT dba MICHAEL )  
SCHMITT PHOTOGRAPHY, an )  
individual, )  
Plaintiff, )  
v. )  
VAG GROUP, INC., a foreign )  
corporation and VAG PERFOR- )  
MANCE, LLC, a foreign limited )  
liability company, )  
Defendant. )

No. CV-09-380-HU

FINDINGS & RECOMMENDATION

Michael Schmitt  
Michael Schmitt Photography  
1420 NW Lovejoy  
Unit 627  
Portland, OR 97209

Plaintiff Pro Se

HUBEL, Magistrate Judge:

Plaintiff Michael Schmitt, dba Michael Schmitt Photography, brings this action against defendants VAG Group, Inc. and VAG Performance, LLC, for copyright infringement. An Order of Default was entered against defendants on June 26, 2009. Plaintiff now moves for entry of default judgment.

1 - FINDINGS & RECOMMENDATION

1 I recommend that the motion be granted and that plaintiff be  
2 awarded \$9,800 in damages.

3 In support of the motion, plaintiff submits a declaration and  
4 several exhibits. In addition, I conducted a prima facie hearing  
5 on plaintiff's motion on November 16, 2009, at which plaintiff  
6 produced additional exhibits and presented testimony. Based on all  
7 of the evidence presented both in writing and at the hearing, I  
8 make the following findings and recommendation.

9 I. Liability

10 To prevail on a claim of copyright infringement, plaintiff  
11 must establish ownership of a valid copyright and copying of  
12 constituent elements of the work that are original. Feist Publ'ns,  
13 Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 360 (1991); see also  
14 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1159 (9th Cir.  
15 2007) (two requirements for prima facie case of direct copyright  
16 infringement are proof of ownership of the allegedly infringed  
17 material and proof that the alleged infringers violated at least  
18 one exclusive right granted to copyright holders under 17 U.S.C. §  
19 106). Pursuant to 17 U.S.C. § 410(c), registration of the  
20 copyrighted works is prima facie evidence of the validity of the  
21 copyright. Under 17 U.S.C. § 106, copyright holders have display  
22 and distribution rights. Display of a copyrighted photograph on a  
23 webpage can violate a copyright holder's rights. Perfect 10, 508  
24 F.3d at 1160.

25 Based on the Order of Default, the well-pled factual  
26 allegations in the Complaint are taken as true. Fair Housing of  
27 Marin v. Combs, 285 F.3d 899, 906 (9th Cir. 2002). Thus, the  
28 record establishes the following facts: Plaintiff, an individual

1 and citizen of Oregon doing business under the assumed business  
2 name Michael Schmitt Photography, is a photographer and owner of  
3 the copyright in a series of four photographic images at issue in  
4 this action. The copyright in the images was registered on or  
5 about October 24, 2008. A copy of the copyright Certificate of  
6 Registration is Exhibit 1 to the Complaint. Copies of the images  
7 themselves are in Exhibit 2 to the Complaint. Defendants VAG  
8 Group, Inc., a corporation, and VAG Performance, LLC, a limited  
9 liability company (referred to collectively in the Complaint as  
10 "Vital"), were formed under the laws of New York and have a  
11 principal place of business there. Defendants sell athletic  
12 apparel and equipment.

13 In 2005, Schmitt began a business relationship with InSport  
14 International, Inc. ("InSport"), an Oregon corporation that sold  
15 athletic apparel. Schmitt twice contracted with InSport in 2005 to  
16 take photographs of people in athletic poses and then licensed the  
17 photographs to InSport for use in marketing. The marketing  
18 included use on InSport's website ([www.insport.com](http://www.insport.com)). On or about  
19 November 25, 2005, defendants acquired InSport and continued to  
20 operate the InSport website to sell athletic apparel under the  
21 InSport name. Defendants also continued to use Schmitt's  
22 photographs to market the apparel under the InSport name.

23 About one year later, on November 17, 2006, Schmitt contracted  
24 with defendants for a third time to take photographs. Schmitt  
25 licensed those photographs to defendants for marketing purposes.  
26 Under the terms of the license, defendants had use of the  
27 photographs for two years. Schmitt remained the owner and  
28 copyright holder of the photographs. Exhibit 3 to the Complaint is

3 - FINDINGS & RECOMMENDATION

1 a copy of the invoice/license granting defendants the use of the  
2 photographs.

3 On or about December 27, 2007, InSport dissolved and  
4 defendants acquired all interests, assets, and liabilities of  
5 InSport, including Schmitt's license to InSport. Defendants  
6 continued selling athletic apparel under the InSport name at the  
7 InSport website and continued using the photographs to market  
8 athletic apparel on the InSport website under the terms of  
9 Schmitt's license.

10 On or about November 17, 2008, the two-year license to use the  
11 four photographic images at issue here, lapsed. It was not  
12 renewed.

13 On or about December 1, 2008, Schmitt learned that defendants  
14 were still using the four images on the InSport website to market  
15 athletic apparel even though the original two-year license with  
16 InSport had lapsed. Schmitt promptly notified defendants that they  
17 were infringing on Schmitt's copyright. Schmitt sent a proposed  
18 invoice which included a license allowing defendants to continue to  
19 use the images, but the parties did not resolve the dispute over  
20 defendants' infringement. Defendants' unauthorized use of the  
21 photographs ceased on January 28 or 29, 2009.

22 Defendants have not paid Schmitt for use of the images after  
23 the expiration of the license. Schmitt is, and at all times was,  
24 the sole owner of the images. He did not and has not authorized  
25 defendants to use the images after the expiration of the license.

26 Based on these facts, plaintiff has established defendants'  
27 liability for copyright infringement of the photographs. Plaintiff  
28 has demonstrated his ownership of the images and defendants'

1 unauthorized display of them.

2 II. Relief Requested

3 A. Money Damages

4 Under 17 U.S.C. § 504(a), an infringer is liable to a  
5 copyright owner for either actual or statutory damages. Plaintiff  
6 elects statutory damages. The amount of statutory damages is to be  
7 "not less than \$750 or more than \$30,000 as the court considers  
8 just." 17 U.S.C. § 504(c)(1). "If statutory damages are elected,  
9 the court has wide discretion in determining the amount of  
10 statutory damages to be awarded, constrained only by the specified  
11 maxima and minima." Jackson v. Sturkie, 255 F. Supp. 2d 1096, 1101  
12 (N.D. Cal. 2003) (internal quotation omitted). Additionally, in a  
13 case where the copyright owner sustains the burden of proving, and  
14 the court finds, that infringement was committed willfully, the  
15 court in its discretion may increase the award of statutory damages  
16 to a sum of not more than \$150,000. 17 U.S.C. § 504(c)(2).

17 Plaintiff seeks a statutory damages award of \$10,000 to  
18 \$15,000 per image, inclusive of an enhancement for defendants'  
19 willful infringement. I first address the award per image without  
20 considering the enhancement.

21 The record shows that before plaintiff submitted the invoice  
22 and license for the images at issue in this case, plaintiff  
23 submitted two other invoices for work done for defendants. Invoice  
24 #20374, dated April 27, 2005, was for a total of \$14,900, including  
25 costs of digital processing, casting, models, stylist, etc. Pltf's  
26 Trial Exh. 1 at p. 3. The usage/license agreement was for two  
27 years of unlimited use for up to thirty images. Id.

28 Invoice #20385-B, dated November 2, 2005, has total expenses

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