BRAGAR, WEXLER & EAGEL, P.C.
Ronald D. Coleman (RC-3875)
885 Third Avenue – Suite 3040
New York, NY 10022
(212) 308-5858

Attorneys for Plaintiff
Robert Burch

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT BURCH, doing business as ROBERT BURCH COMMUNICATIONS, Plaintiff, v. THOMAS NYARKO, doing business as BLACK STAR TRAVEL AND TOURS, Defendant.	**CIVIL ACTION NO. 06-7022** **PROPOSED CONCLUSIONS OF LAW**

Pursuant to the Scheduling Order for Damages Inquest, dated February 2, 2007 ("Scheduling Order"), Plaintiff Robert Burch, doing business as Robert Burch Communications, submits his Conclusions of Law, which sets forth the legal principles applicable to plaintiff's claims for damages. (A copy of the Scheduling Order is attached as Exhibit A to the Certification of Ronald D. Coleman).

I. STANDARD FOR CONSTRUING ALLEGATIONS IN THE COMPLAINT WHERE DEFENDANT HAS DEFAULTED

1. When the Court enters a default judgment, it must "'accept [ ] as true all of the factual allegations in

the complaint.'" *See Tiffany, Inc. v. Luban,* 282 F. Supp.2d 123, 124 (S.D.N.Y. 2003) (citing *Au Bon Pain Corp. v. Artect, Inc.,* 653 F.2d 61, 65 (2d Cir. 1981).

II. STANDARD FOR RECOVERING DAMAGES UNDER THE COPYRIGHT ACT OF 1976

a. *General standard for recovering statutory damages*

2. Under the Copyright Act of 1976 (the "1976 Act"), a copyright owner is entitled to recover either (i) "[his] actual damages and any additional profits of the infringer…or (ii) statutory damages. . . " 17 U.S.C. § 504(a) (emphasis added). If plaintiff elects to recover statutory damages, section 504(c) of the 1976 Act applies and provides as follows:

(c) Statutory Damages.--

> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all parts of a compilation or derivative work constitute one work.
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully,

> the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200 . . .

17 U.S.C.§ 504(c). Under section 504(c)(1), plaintiff is entitled to recover statutory damages up to $30,000 for each "work" that defendant has unlawfully infringed. 17 U.S.C. § 504(c)(1). Furthermore, under section 504(c)(2), if the "infringement was committed willfull . . . the court may increase the award of statutory damages to . . . 150,000." 17 U.S.C. § 504(c)(2), subject to the court's "wide discretion" *Fitzgerald Publ. Co., Inc. v. Baylor Publ. Co., Inc.,* 807 F.2d 1110, 1116 (2nd Cir. 1986).

Before determining the specific amount of statutory damages to award to plaintiff, a threshold issue the court must consider is how many of plaintiff's "works" defendant has infringed.

b. *Standard for recovering separate statutory awards where defendant has infringed multiple works belonging to plaintiff.*

If defendant has infringed multiple works belonging to plaintiff, then plaintiff can recover separate statutory awards for each work if plaintiff establishes that each copyrighted work qualifies as "one work." 17 U.S.C. §

504(c)(1) ("For purposes of this subsection, all the parts of a compilation or derivative work constitute one work."). In other words, the infringed works together cannot be part of a "derivative work" or "compilation." *Id.* The 1976 Act defines a "compilation" as

> a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works.

17 U.S.C. § 101. In addition, the 1976 Act defines the term "collective work" as:

> a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent from the works in themselves, are assembled into a collective whole.

17 U.S.C. § 101; *see also Stokes Seeds Ltd. v. GEO. W. Park Seed Co., Inc.*, 783 F. Supp. 104, 106-7 (W.D.N.Y. 1991) (citing same statutes and finding that all photographs printed in one book as a "'collective' work . . . justifying a single award for statutory damages"); *Eastern Am. Trio Prods. v. Tang Electronic Corp.*, 97 F. Supp.2d 395, 420 (S.D.N.Y. 2000) (finding that photographs published in two separate catalogs constituted "two compilations" justifying two separate statutory awards).

3. Accordingly, under these provisions of the 1976 Act, as long as a photographer does not assemble all his

photographs in a compilation or collective work, such as a book or a catalogue, and instead prints or otherwise distributes his photographs separately, then each of his photographs should be considered "one work" for the purposes of awarding damages. 17 U.S.C. § 504(c)(1); *see also Wilen v Alternative Media Net, Inc.,* 2005 WL 167589, *5 (S.D.N.Y. Jan. 26, 2005) (unpublished disposition) (awarding statutory damages for each of the seven infringed photos); *Stokes Seeds Ltd.,* 783 F. Supp. at 105 (noting that defendant had never "reproduced or printed the photographs independently of the books" in which the photos were printed). Indeed, each of the photographs must have the "artistic merit" and "commercial viability" to be considered a separate work of art. *Stokes Seeds Ltd.,* 783 F. Supp. at 107

4. The number of copyright registration statements that plaintiff has filed does not solely determine the issue when assessing the number of "works" for which a plaintiff may recover statutory damages. *See, e.g., Twin Peaks Prods., Inc. v. Publ. Int'l, Ltd.* 996 F.2d 1366 1381 (2d Cir. 1993) (noting how many copyright statements were filed, but employing a more qualitative analysis in assessing whether the infringed work was a separate work or part of a compilation); *Stokes Seeds Ltd.,* 783 F.Supp. at 105 (same). Simply examining how many copyright registration statements

have been filed by plaintiff without employing a more qualitative analysis of the facts would result in an overly formalistic standard, one which would encourage copyright owners simply to file multiple registration statements just so a court would consider each "work" separate for purposes of awarding damages under the 1976 Act. Furthermore, how a plaintiff classifies his "works" in the copyrights registration statements (i.e., whether he describes his works as a collection or compilation) should not matter for purposes of awarding damages. *See, e.g., Stokes,* 783 F. Supp. at 107 (finding that "classifications" in a copyright registration statement "have no significance with respect to the subject matter of a copyright or the exclusive rights provided by the Act.").

c. *Standard for determining the amount statutory damages to award plaintiff for each work defendant has infringed.*

5. Under Section 504(c)(1) ofthe 1976 Act, a court may award statutory damages for each infringed "work . . . in a sum of not less than $750 or more than $30,000 as the court considers just." 17 U.S.C. § 504(c)(1). In determining the amount of statutory damages to award plaintiff, courts have considered the following factors:

(1) Revenues lost by plaintiff as a result of

the defendants' conduct.

(2) Expenses saved and profits reaped by the infringers in connection with the infringement.

(3) Deterrant effect on others beside the defendant.

(4) Degree of culpability of the defendant (i.e., whether the infringer's state of mind is willful, knowing or innocent).

See, e.g., N.A.S. Import Corp. v. Chenson Enterprises, Inc., 968 F.2d 250, 252 (2nd Dept. 1992) (citing listed factors); *Fitgerald Publ. Co.,* 807 F.2d at 117 (same); *see also Arclightz and Films PVT. Ltd. v. Video Palace Inc.,* 303 F. Supp. 356, 362 (S.D.N.Y. 2003) (also considering the "cooperation of the defendant in providing evidence concerning the value of the infringing material"); *Getaped.Com, Inc. v. Cangemi,* 188 F. Supp.2d 398, 403 (S.D.N.Y. 2002) (also considering "the value of the copyright"); *Fedtro v. Kravex Mfg. Corp.,* 313 F. Supp. 990, 997-98 (E.D.N.Y. 1970) (in determining profits reaped by defendant from its infringement of plaintiff's product, court noted that although the infringed work was "not a product sold to the consumer . . . it . . . functions as a 'silent salesman' of [defendant's] product.").

6. Courts usually increase the statutory damages awards well above the market value of the infringed

photographs in order to deter others beside the defendant from committing similar infringements. *See, e.g., Fallaci v. New Gazette Literary Corp.,* 568 F. Supp. 1172, 1174 (S.D.N.Y. 1983) (doubling the fair market value of the infringed right to arrive at an amount sufficient to deter a willful infringer because "[a] willful infringer…should be liable for a substantial amount over and above the market value of a legitimate license . . . "). Without a substantial increase above the market value, copyright infringers simply would gamble on stealing other people's works knowing that the maximum amount they would have to pay would be the market value for the copyrighted work or a few dollars more. *See id.*

d. *Standard for increasing plaintiff's statutory damages to $150,000 due to defendant's "willful" infringement of plaintiff's works.*

7. Under section 504(c)(2) of the 1976 Act, if "the court finds, that infringement was committed willfully, the court in its discretion may increase the statutory damages to a sum of not more than $150,000." 17 U.S.C. § 504(c)(2). Defendant's conduct is "'willful'" if defendant had "'actual or contructive' . . . knowledge that his actions constitute infringement.'" *N.A.S. Import, Corp.,* 968 F.2d at 252 (citing *Fitzgerald Publ. Co.,* 807 F.2d at 115). "In other words, it need not be proven directly but may inferred from

the defendant's conduct." *Id.* In addition, "reckless disregard of the copyright holder's rights (rather than actual knowledge of infringement) suffices to warrant an award of the enhanced damages." *Id.; see also Merchant Media,* 2006 WL 3479022, at *4 (same).

8. Courts have considered the following types of conduct as evidence of defendant's "willful" infringement:

- Defendant fails to appear in the action. *See, e.g., Fitzgerald Publ. Co., Inc.,* 807 F.2d at 115 (recognizing that a "failure to appear and defend in the copyright action" could serve as a basis for finding that defendant acted "willfully"); *Fallaci,* 568 F.Supp. at 1173 ("we draw a further inference of willfulness from the defendant's failure to appear and defend this action…").

- Defendant continues to infringe plaintiff's works despite plaintiff's repeated notices and warnings that defendant's use of plaintiff's product constitutes infringement. *See, e.g., Int'l Korwin Corp. v. Kowalczyk,* 855 F.2d 375, 380-81 (7th Cir. 1988) (discussing continued disregard of warning letters as grounds for finding willful infringement) (cited by Second Circuit in *N.A.S. Import Corp.,* 968 F.2d at 253).

- Defendant has an understanding of the copyright laws, as evidenced by the fact that defendant himself posts copyright notices to prevent the infringement of his own work. *See, e.g., Fallaci,* 568 F.Supp. at 1173 (drawing inference that defendant willfully infringed plaintiff's newspaper article where defendant's own newspaper contained a copyright notice.).

e. *Standard for collecting attorneys' fees and costs in a copyright infringement action.*

9. Under section 505 of the 1976 Act, "the court in

its discretion may allow the recovery of full costs by or against any party…and may also award a reasonable attorney's fees to the prevailing party as part of the costs." 17 U.S.C. § 505; *see also Merchant Media, LLC,* 2006 WL 3479022, at *12 (citing statute); *N.A.S. Import, Corp.,* 968 F.2d at 254 ("[F]ees are generally awarded to a prevailing plaintiff.") (citation omitted); *Arclightz and Films PVT. Ltd.,* 303 F. Supp.2d at 365 (in copyright action, "'costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs.'") (quoting Fed.R.Civ.P. 54(d)). In deciding whether to grant attorney's fees to the prevailing party, "the objective reasonableness of the non-prevailing party's position is a central consideration." *Merchant Media, LLC,* 2006 WL 3479022, at *12 (citing *Matthew Bender & Co. v. West Pub'g Co.,* 240 F.3d 116, 121-22 (2d Cir. 2001). If "defendant[ ] default[s]," a court "necessarily cannot conclude that their position was objectively reasonable." *Id.*

10. In addition to the objective reasonableness of the defendant's position, courts will consider additional factors, such as "'frivolousness, motivation . . . and the need in particular circumstances to advance considerations of compensation and deterrence.'" *Id.* (citing *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 535 n. 19 (1994)). A court

will not award attorney's fees and costs where a case involves "'the presence of complex or novel issues, a defendant's innocent state of mind, or prosecution of the case in bad faith." *Id.* (citations omitted).

_____/s/_____
RONALD D. COLEMAN

BRAGAR, WEXLER & EAGEL, P.C.
885 Third Avenue – Suite 3040
New York, NY 10022
(212) 308-5858

Attorneys for Plaintiff
Robert Burch

Dated: March 23, 2007