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**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 FINDINGS OF FACT

Pursuant to the Scheduling Order for Damages Inquest, dated February 2, 2007 (a copy of the Scheduling Order is attached as Exhibit A to the Certification of Ronald Coleman ("Coleman Certification" or "Coleman Cert.")), plaintiff Robert Burch ("plaintiff" or "Mr. Burch"), doing business as Robert Burch Communications, submits the following Proposed Findings of Fact:

I. BACKGROUND

1. "Plaintiff Robert Burch is an individual doing business as Robert Burch Communications. He is a professional photographer residing at 2725 St-Joseph

Boulevard, Lachine, Quebec." (Complaint ("Compl."), at ¶ 4) (a copy of Complaint, including all of its accompanying exhibits, is attached as Ex. B of the Coleman Certification).

2. "Defendant Thomas Nyarko is an individual doing business as Black Star Travel and Tours or Black Star Tours at 3832 White Plains Road, Bronx, New York ("Black Star"). Black Star is a travel agency." (*Id.*, at ¶ 5)

3. "Mr. Burch's professional photography portfolio features, among its wide range of subjects, an unusual selection of photographs of people, places and things in exotic, hard-to-get-to locations such as the Ivory Coast in Africa, Ghana, Nigeria, the Serengeti, and West Africa." (*Id.*, at ¶ 7).

4. "As part of his extensive work as a travel photographer, Mr. Burch is involved with the tourist boards of several West African states pursuing the development of Western tourism in their countries." (*Id.*, at ¶ 8).

5. "His professional Internet website, <http://www.burchcom.com>, features a wide array of photographs taken on his world travels at considerable expense and trouble and, in some cases, personal risk." (*Id.*, at ¶ 9).

6. "The above-entitled action is for equitable and monetary relief resulting from defendant's unauthorized use of plaintiff's photographs by defendant on Black Star's website." (Coleman Cert., at ¶ 2)

II. DEFENDANT'S COPYRIGHT INFRINGEMENT OF MR. BURCH'S PHOTOGRAPHS

7. Defendant has infringed no fewer than four separate photographs belonging to Mr. Burch. (See Compl., at ¶¶ 16, 17; see also Compl., at Ex. A (containing true copies of copyrighted photographs)). Each of these four photographs "contains material wholly original with Mr. Burch and is copyrightable under the Copyright Act." (*Id.*, at ¶ 11). Indeed, "Mr. Burch has copyrighted each photograph in full compliance with the Copyright Act." (*Id.*, at ¶ 12). Mr. Burch filed two separate Certificates of Registration for the four photographs that defendant has infringed. (See *id.*, at ¶ 12; see also *id.*, at Ex. B (containing the two Certificates of Registration)). Accordingly, "[a]t all relevant times, Mr. Burch has been and still is the owner of the exclusive rights to reproduce and distribute, and to authorize the reproduction and distribution of the [four] photographs" that defendant has infringed. (*Id.*, at ¶ 13).

8. "On the morning of June 12, 2006, while viewing

a website related to events in Ghana, Mr. Burch happened to see a news story about a photographer who was sent to the World Cup tournament in Germany to report on Ghana's team and its progress during the World Cup matches. This news story acknowledged various benefactors that made the trip possible for the photographer. Among those named were Black Star Tours of Bronx, New York and its director Thomas Nyarko." (*Id.*, at ¶ 14).

9. "The news story provided a link to the Black Star Tours website. Because Mr. Burch is involved with tourism-related endeavors in Ghana, he was curious to see who these people are and what they offer, and followed the link to Black Star Tours' website, which was then found at <http://blackstartours.com>." (*Id.*, at ¶ 15).

10. "Mr. Burch was surprised to discover three of his photographs being used on the very first page of the website as part of a changing photo montage set to music." (*Id.*, at ¶ 16; see also *id.*, at Ex. C) (containing a screen shot of that web page).

11. "Upon further investigation of the inside pages of the website, he found one of these images used again as a smaller element, plus a fourth photo that had been altered without permission." (*Id.*, at ¶ 17; see also *id.*, at Ex. D (containing screen shots of those web pages)).

12. "Mr. Burch decided to contact Black Star Tours and inquire as to why his images were being used without permission." (*Id.*, at ¶ 18). Details of Mr. Burch's communications are discussed below.

13. Ultimately, after various attempts to procure payment from the defendant for the use of his photographs failed (as will be discussed below), Mr. Burch filed "[a] Summons and Complaint...on September 12, 2006." (Coleman Cert., at ¶ 3 & Ex. B). In the Complaint, Mr. Burch elected to recover statutory damages. (See Compl., Prayer for Relief, at ¶ 3).

14. Despite properly serving defendant with a copy of the Summons and Complaint, "[d]efendant failed to answer the Complaint and the time for defendant to answer the complaint [] expired." (*Id.*, at ¶ 4; see also *id.*, at ¶ 4).

15. As a result, "[o]n December 28, 2006, this Court entered an Order of Default, ordering that the plaintiff have judgment for damages against defendant in an amount to be determined by inquest with interest calculated pursuant to 28 U.S.C. Section 1961 running from September 19, 2006, plus costs and disbursements of this action to be determined by the court upon consideration of the submissions of counsel following the inquest." (Coleman

Cert., at ¶ 6 & Ex. C (Order of Default)).

III. MR. BURCH IS ENTITLED TO THE MAXIMUM DAMAGES PERMITTED UNDER THE COPYRIGHT ACT OF 1976

- a. *Mr. Burch is entitled to recover separate statutory damages award for each of the four photographs that defendant has infringed.*

16. Defendant has infringed no fewer than four separate photographs belonging to Mr. Burch. Consequently, Mr. Burch is entitled to four separate awards of statutory damages. (See Conclusions of Law ("Concl. Law"), at § II(B)).

17. Mr. Burch's photographs are all separate works of art. They are not part of a "compilation" or "derivative work." (Concl. Law, at ¶ 3). Mr. Burch has never published these photographs in any one book or catalog, or a periodical issue, anthology, or encyclopedia, nor has he collected or assembled the photographs in such a way that the resulting work as a whole constituted an original work of authorship. See <http://www.burchcom.com> (the only place where the photos are displayed). Indeed, the opposite is true: each of Mr. Burch's photographs stands on its own - each has the artistic merit and commercial viability to be considered a separate work of art. See *id.* Mr. Burch displays each of the photographs separately on his website and allows any

visitors to the website to license each individual photograph separately. Thus at <http://www.burchcom.com>, if a person right-clicks any photograph, a pop-up window containing an exclamation mark inside a yellow triangle appears with the following message: "If you would like to license this image, please contact: burchcom@total.net." The only common link these infringed photographs have is that Mr. Burch took all these pictures in Ghana. See *id.* Without more, these photographs do not qualify as a "compilation" or "collection" under the 1976 Act. Consequently, each photograph is a separate "work," and Mr. Burch is entitled to a separate statutory award for each photograph. See *Concl. Law*, at ¶ 3.

b. Mr. Burch is entitled to the full \$30,000 in statutory damages permitted under the 1976 Act for each of the photographs defendant has infringed

18. Mr. Burch is entitled to the full \$30,000 permitted by the 1976 Act for each photograph defendant has infringed because all of the factors a court assesses in determining the amount of statutory damages are in Mr. Burch's favor. (See *Concl. Law*, § II(c), at ¶ 6). Applying only the first factor – namely the revenues lost by plaintiff as a result of defendant's infringement – Mr. Burch would be entitled to over \$13,000 per photograph.

This figure is based on the detailed invoices Mr. Burch submitted to defendant. (See Compl., Ex. F & ¶¶ 21, 25). The latest invoice Mr. Burch sent to defendant totaled \$55,017.40, "the full amount of actual fees that [defendant] would have had to pay [through July 1, 2006] if it had used the services of one of plaintiff's online authorized agents to purchase the licensing rights to his images. These rights [were] determined by the actual usage, placement on the website, duration of use, size of image and other factors. A monthly charge was determined for the six months of usage that Mr. Burch's investigation revealed, based on the dates and times on which the website code was uploaded, the measure of time that three of the images were used, and three months of usage for the other two images (one of which being a smaller version of the previous three). An additional charge was made for the alteration of one image without consent." (*Id.*, at ¶ 21).

19. If the court simply divided this \$55,017.40 figure by the four photographs defendant has infringed, Mr. Burch would be entitled to statutory damages of \$13,754.35 per photograph. These are the damages that Mr. Burch is entitled to if the court only considered the first factor.

20. Once the Court assesses the remaining factors - the degree of culpability of defendant, the profits reaped by the defendant and the deterrent effect on others beside the defendant, all of which are in Mr. Burch's favor - the statutory amount Mr. Burch should be entitled to should rise to the maximum amount of \$30,000 per photograph. (See Concl. Law, at ¶ 6). First, the culpability of defendant is so high here that it warrants an entirely separate section in the Proposed Findings of Fact. See *infra* § II(c). Second, regarding the profits reaped by the defendant as a result of his infringement of Mr. Burch's work, a good portion of those profits - at least those in connection with Black Star Tour's ("Black Star") sale of travel packages to Ghana - are attributable to defendant's use of Mr. Burch's exotic photos on Black Star's website. See Compl. at ¶ 16 ("three of [Mr. Burch's] photographs [were] being used on the very first page of the website.") (emphasis added). After all, one of the main attractions for travelers who are browsing the defendant's website and considering a trip to an exotic location like Ghana are the quality and attraction of Mr. Burch's photos of Ghana. (See *id.*). Defendant recognized this marketing potential when it decided to post them on the first page of Black Star's website. (See *id.*).

Unfortunately, since defendant has not even bothered to appear in this action or cooperate with Mr. Burch in any way, Mr. Burch does not have access to information concerning Black Star's profits (See Coleman Cert., at Ex. C, Order of Default). Nevertheless, even without the hard numbers to prove that defendant's profits have increased since he began infringing Mr. Burch's exotic photographs, it can be inferred that defendant has profited in some way; note that his business continues to flourish. (See *id.*). Mr. Burch is entitled to an increase in the statutory damages award based on this factor. Not increasing the awards would reward the defendant for not making this information available.

21. Mr. Burch is entitled to an increase to this statutory damages award also based on the last factor, namely for the purpose of deterring defendants other than defendant from committing similar infringements. (See Concl. Law, at ¶ 7). Without a substantial increase over the market value of the infringed works, other infringers would be encouraged to take the same gamble that defendant did - namely, infringing defendant's photographs and keeping their fingers crossed that the owner will not discover their theft, but knowing that if defendant does catch them, the worst case scenario is that they would

have to pay the market value of the copyrighted work or a few dollars more. (See *id.*).

c. Defendant's "willful" infringement entitles Mr. Burch to \$150,000 for each infringed photograph.

22. There is no doubt that defendant's infringement was "willful." In fact, it is rare to find a situation - such as here - where the different types of conduct that courts consider as evidence of defendant's willfulness are all present in one case. (See Concl. Law, at ¶¶ 8, 9). First, defendant has failed to appear in this action. (See Coleman Cert., at Ex. C, Order of Default) ("defendant not having answered the complaint, and the time for answering the Complaint having expired, it is ordered..."). Second, defendant knew that he was infringing Mr. Burch's photographs because Mr. Burch's website - where defendant discovered the photographs - "features copyright notices as well as instructions and prices for those interested in licensing his work for their own use." (Compl., at ¶ 10). Third, defendant, a sophisticated and successful businessman, "knows better": After all, defendant himself posts a copyright notice on Black Star's website.

23. Finally, and most significantly, defendant knew he was willfully infringing Mr. Burch's photographs

because Mr. Burch informed him that he was doing so on many occasions - Mr. Burch called the defendant and sent him invoices detailing the value of his work by Certified, Registered, and regular mail, as well as by facsimile.

24. Indeed, on June 13, 2006, plaintiff called Mr. Burch and informed him "that his photographs require a negotiated license for the [use] already made by Black Star Tours, plus a license for continued usage." (*Id.*, at ¶ 20). Knowing that he had stolen Mr. Burch's photographs, defendant "became very agitated" and resorted to "using abusive language, including a number of expletives." (*Id.*, at ¶ 20). Finally, defendant "concluded with the admonishment to 'never call [his] office again.'" (*Id.*). After his effort to reach out to defendant failed, Mr. Burch "prepared an invoice setting forth the full amount of actual fees that [defendant] would have had to pay if it had used the services of one of plaintiff's online authorized agents to purchase the licensing rights to his images." (*Id.*, at ¶ 21). Mr. Burch then sent this invoice "along with printouts of fee pages and rates from his authorized online agent" in a "Certified Mail envelope" to defendant. (*Id.*, at ¶ 22). Since "there was no one to accept the envelope...a notice was left [at defendant's business address] that it could

be retrieved at the local post office.” (*Id.*, at ¶ 22). Defendant never contacted the post office or Mr. Burch. As a result, the envelope containing the invoice remained “unclaimed and subsequently returned to Mr. Burch...” (*Id.*).

25. Nevertheless, defendant continued to use Mr. Burch’s “photographs . . . without permission” on Black Star’s website. (*Id.*, at ¶ 23). Because “this usage constituted an additional month of usage,” Mr. Burch revised the initial invoice “to include the additional charges,” this time sending it to defendant by both “Registered Mail from Canada and by regular mail.” (*Id.*, at ¶¶ 24, 25). “An attempt was made to deliver the envelope to the offices of Black Star Tours on July 14, 2006, but delivery was refused and subsequently the envelope containing this second attempt to notify [defendant] was returned to Mr. Burch.” (*Id.*, at ¶ 25).

26. Since his attempts to communicate with defendant by phone and mail had failed, on July 14, 2006, Mr. Burch tried faxing his invoice to defendant. (*See id.*, at ¶ 27). “A printout from Mr. Burch’s fax machine indicated that the fax did go through.” (*Id.*). This was also later confirmed when Mr. Burch “received a return fax from Black Star Tours requesting that he send it again because a

portion was not legible." (*Id.*) The next day, "Mr. Burch re-sent his invoice by fax to the offices of Black Star Tours. Once again his machine indicated that it had been received." (*Id.*). Once again there was no reponse by the defendant. Despite the silence from defendant, Black Star Tours continues to thrive - it "ha[s] been very busy . . . and is expanding to North Carolina and beyond" and has a new, professionally designed and sophisticated website (Coleman Cert., at ¶ 7 & Ex. D).

27. Mr. Burch could not have done anymore to put defendant on notice that his photographs were being infringed. Defendant has simply chosen to ignore plaintiff as well as the legal system in general. This is the height of "wilfullness." Consequently, Mr. Burch should be entitled to \$150,000 for each of the photographs that defendant has infringed.

d. Mr. Burch is entitled to his attorney's fees due to defendant's blatant disregard of Mr. Burch's rights.

28. Mr. Burch has prevailed in this action. (See Coleman Cert., Ex. C, Order of Default). On this basis alone, Mr. Burch could be entitled to all attorney's fees and costs. Even if, however, the Court requires more before awarding Mr. Burch his attorneys' fees and costs, it need only look at defendant's conduct in this action,

none of which shows any "objective reasonableness." (See Concl. Law, at ¶ 10) These actions include (i) willfully infringing Mr. Burch's photographs, (ii) subsequently ignoring all attempts by Mr. Burch to professionally discuss the matter with him, and (iii) ignoring the legal system by failing to appear in the action. (See *supra*, §II(c)). Indeed, there are no factors in the present case that would justify denying an award, such as the presence of complex or novel issues, a defendant's innocent state of mind, or prosecution of the case in bad faith. (See *id.*). For these reasons, Mr. Burch should be entitled to receive all his attorney's fees and costs in this action.

IV. CONCLUSION

29. For the reasons stated above, Mr. Burch should be entitled to the maximum statutory damages of \$150,000 for each of the four photographs that defendant has infringed. As a result, Mr. Burch should be awarded \$600,000, with interest calculated pursuant to 28 U.S.C. § 1961 running from September 19, 2006 (as ordered in the Order of Default, dated December 28, 2006), plus his attorney's fees, costs, and disbursements.

_____/s/_____
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